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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON AND RUSSELL T. THOMPSON,
Appellants,

vs.

CITY OF LONG BEACH

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Superior Court No. Civ. A 8063

Trial Court No. 74,714

CECELIA S. LARSON,
Plaintiff and Appellant,

vs.

CITY OF LONG BEACH, A MUNICIPAL CORPORATION,
Defendant and Appellee

Superior Court No. Civ. A 8064

Trial Court No. 75,161

RUSSELL T. THOMPSON,
Plaintiff and Appellant,

vs.

CITY OF LONG BEACH, A MUNICIPAL CORPORATION,
Defendant and Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as Amended, plaintiffs and appellants, respectively, in each of the above entitled actions,

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submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decisions of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, made and filed in the above entitled causes and by which the respective judgments of the trial court (The Municipal Court of Long Beach Judicial District, County of Los Angeles, State of California) in favor of plaintiffs were reversed. Since the appeals were consolidated for argument in the state court and present substantially the same Federal question, plaintiffs are presenting their respective appeals herein upon a single set of supporting papers.

Opinions Below

The opinions of the Appellate Department of the Superior Court of Los Angeles County are not reported, but copies thereof are annexed hereto as Appendix A and B, respectively. The judgments of the trial court, respectively, by which that court by implication found to be true the various allegations as contained in plaintiff's complaint in each action, respectively, are annexed hereto as Appendix C and D, respectively. Under state practice no findings are required where the judgment is for money only and the amount is less than $300.00, but the legal effect thereof is to find in favor of the plaintiff upon all of the material issues as presented by the pleadings. (*Mistrofini* v. *Swanson*, 114 A. C. A. Supp. 567, 250 P. 2d 764); hence, the complaint in each action is annexed hereto as Appendix E and F, respectively.

Questions Presented

1. Does the performance of services and the submission to salary deductions by a public employee in reliance upon the terms of a statute, which offers to pay specified retirement, disability and death benefits in consideration of the

performance of a given number of years of service (twenty or more years) in certain hazardous positions (police and fire department work) ripen into a contractual right upon the part of the employee and his dependents to receive the specific benefits so promised after the contingency which calls for payment has occurred (service connected death, disability or retirement for length of service), which is protected by the contract and due process clauses of the Federal Constitution against impairment by subsequent legislative action upon the part of the State?

Here the statutory provisions (Long Beach Charter Section 187), which were in force at the time the services were rendered and at the time of the happening of the contingency which entitled the appellants, respectively, to receive the benefits in question, obligated the defendant City to make monthly payments equal to fifty per cent of the salary attached to the rank or position held by the employee at the time of his death or retirement, i. e., a monthly payment which varied in accordance with the salary currently attached to such rank or position. As construed by the California Supreme Court in the case of *Casserly* v. *City of Oakland*, 6 Cal. 2d 64, 56 P. 2d 237, the purpose of this type of a formula was to keep the monthly payments adjusted to the current value of the dollar, since the salary being paid to existing employees is usually adjusted to meet current economic conditions. By the terms of the challenged statute (Charter Section 187.2), the constitutionality of which was upheld by the decision of the Appellate Department of the Superior Court in reversing the judgments of the Long Beach Municipal Court, the charter framers (the City Council) sought to freeze or fix "the amount to be paid as a pension to each person granted a pension prior to the effective date of this amendment, pursuant to rights thereto vested by reason of the provisions of Section 187 of this Charter * * * at the amount paid to each such per-

son by the City on the effective date of this amendment and thereafter said pension shall be paid monthly in said fixed amount." In other words the obvious purpose and effect of the charter amendment was to change the City's obligation under an existing contract to pay specified retirement and death benefits based upon a definite percentage of the salary presently attached to the rank previously held by the employee at the time of his retirement or death (so as to keep them adjusted to the current value of the dollar), to a set amount, namely, the amount that the City happened to be paying on June 5, 1951. In the month of July, 1951, the current salaries of policemen and firemen were increased approximately fifty dollars per month, which, under the terms of the statute in force at the time plaintiffs' pension rights became vested, would have entitled them to receive a corresponding increase of approximately $25.00 per month, but for the effect of said Section 187.2. Hence, the practical effect of the amendment in the first month following its effective date was to decrease the death and retirement benefits otherwise payable to plaintiffs respectively, to the extent of approximately $25.00 per month. Since that time, several additional raises have been made in the salaries currently attached to the same positions. A secondary question therefore presented is whether or not the modification in question impairs the City's contractual obligation toward the instant plaintiffs, as determined by the trial court.

A further question presented in the *Thompson* case is whether a former judgment in declaratory relief between the same parties wherein the court had determined that Mr. Thompson's right to earn and receive the retirement benefits provided by said Charter Section 187 is and was "contractual in nature and hence within the protection of the provisions of * * * Section 10 of Article I of the Constitution of the United States as well as the Fourteenth

Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations," was res judicata with respect to the nature and extent of the City's contractual obligation toward said plaintiff in the case at bar. The appeal presents other closely related questions as more particularly set forth in the assignment of errors and prayer for reversal filed herewith.

Statutes Involved

The case draws into question the validity of Section 187.2, Subdivision (a), of the Long Beach City Charter, which, by its express terms, purports to alter the formula for determining the amount to be paid on account of death, disability, or retirement benefits to persons already having a vested right to receive the same under the provisions of Section 187 of the same charter, viz: "(a) The amount to be paid as a pension to each person granted a pension prior to the effective date of this amendment, pursuant to rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, is hereby fixed in each instance at the amount paid to each such person by the City on the effective date of this amendment and thereafter such pension shall be paid monthly in said fixed amount; * * *" (Statutes 1951, p. 4635.)

Under the terms of said Section 187, as originally adopted in 1925 and as the same remained in force and effect up to and including the time that plaintiffs' rights, respectively, became vested, the same provided for the payment of retirement benefits in equal monthly installments to any member of the City's Police or Fire Department who shall have served therein twenty or more years in the aggregate, in accordance with the following formula: "for twenty years'

service, fifty per cent (50%) of the annual salary of the rank or position held by him one year prior to the date of retirement, and an additional one and two-thirds per cent (1 2/3%) of such salary for each year over twenty years and less than thirty years in the aggregate served by such member before retirement." If a member was compelled to retire because of a service connected disability or illness, said charter section provided for the payment to him of a "yearly pension equal to one-half (½) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order." If he died after retirement, while eligible for retirement or as the result of a service connected injury or illness, his widow or dependent child or parent was entitled to receive "an annual pension * * * in equal monthly installments * * * in an amount equal to one-half (½) of the salary attached to the rank or position which such deceased person held in such department at the time of his death, or one year prior to the date of his retirement from active duty in such department." (Stats. 1925, p. 1333.) In 1931 the section was amended so as to require a deduction of 2% from the salary of each active member of the Police or Fire Department and the payment thereof into the fund from which the benefits in question were to be paid (Stats. 1931 p. 2780).

By the terms of Charter Section 187.1, which purportedly became effective March 29, 1945, said Section 187 was repealed with the proviso that any member of the Fire or Police Department who had served twenty or more years on that date, might retire at any time within the succeeding five years, and beginning with the date of such retirement "be paid a pension of such percentage of his salary as he would have been entitled to receive had he been retired on the effective date of this amendment." In the case of *Kern* v. *City of Long Beach* (April, 1947), 29 Cal. 2d 848, 179 P. 2d 799, the California Supreme Court held specifically

that said Section 187.1 contravened the contract clause of the Federal Constitution and hence was ineffective insofar as it purported to affect the retirement rights of the petitioner Kern who had served slightly less than the required twenty years in the City's Fire Department upon the effective date of said repeal. In so doing the highest California court expressly determined that the right to mature said retirement pension was contractual in nature, and that after the employee had accepted and performed substantial service in reliance upon such a statutory offer, there arose a contractual obligation upon the part of the City which could not be eliminated by an outright repeal of the statute. In defining the nature of the right ultimately acquired by such an employee the court in the *Kern* case quoted with approval the following language of the highest court of New York in the case of *Giannettino* v. *McGoldrick*, 1946, 295 N. Y. 208, 66 N. E. 2d 57, 59 viz.:

> "'Pension annuities * * * are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services.' *Giannettino v. McGoldrick*, 1946, 295 N. Y. 208, 66 N. E. 2d 57, 59." (*Kern* v. *City of Long Beach*, 179 P. 2d 799 at p. 801.)

In the same case, however, the California court in an effort to reconcile some conflicting statements in some of the earlier California cases observed by way of constructive dictum that pension systems were subject to reasonable modification in order to keep them adjusted to changing conditions, insofar as the rights of existing employees, as distinguished from retired members, were concerned. Prior to this decision the California cases were somewhat divided upon the question of whether or not the employee or his dependents acquired any vested right to receive such a pay-

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ment prior to the happening of the contingency which matured the pension. (*Pennie* v. *Reis*, 80 Cal. 266, 22 P. 176 affirmed 132 U. S. 464, 33 L. Ed. 426; *Brophy* v. *Employees' Retirement System*, 71 Cal. App. 2d 455, 162 P. 2d 939.) Prior to the decisions of the Appellate Department of the Superior Court in the instant cases, however, there has never been any California decision which questioned the principle that after the contingency had occurred (death, disability, or retirement for length of service), the retired member and/or his dependent had a vested, contractual right to receive the specific benefits provided for by the terms of statute in force at the time of the happening of such contingency. (*Pennie* v. *Reis, supra; Kavanagh* v. *Board of Police Pension Fund Commissioners*, 134 Cal. 50, 66 P. 36; *Vero* v. *Sacramento City Employees*, 41 Cal. App. 2d 482, 107 P. 2d 82; *England* v. *City of Long Beach*, 27 Cal. 2d 343, 163 P. 2d 865.)

In the case of *Allen v. City of Long Beach* (1950), 101 Cal. App. 2d 15, 224 P. 2d 792, (hearing denied by the California Supreme Court, appeal dismissed by U. S. Supreme Court), the California District Court of Appeals held that said Section 187.1 was effective to the extent of preventing existing employees from earning more than the minimum retirement benefits provided for by said Section 187, namely, 50% of the salary attached to the rank held for one year at the time of retirement. This was an action in declaratory relief which included as parties plaintiff all members of the Police and Fire Departments (some 400 in number) of the City of Long Beach, including the instant plaintiff and appellant, Russell T. Thompson, and the court by its final decree as modified by the decision of the District Court of Appeal, *supra*, specifically determined that the rights of the various plaintiffs to earn and receive said retirement and disability benefits "are and were contractual in nature and hence, within the protection of the provisions of Article I,

Sections 13 and 16 of the Constitution of the State of California and of Section 10 of Article I of the Constitution of the United States as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations, provided, however, that said contractual rights are limited, with respect to a retirement pension, to an annual pension equal to one-half of the salary attached to the rank held by such plaintiff or plaintiffs one year prior to the date of their respective retirements, and no more." A copy of said judgment, as attached to the complaint in the *Thompson* case, appears in Appendix F hereto annexed.

The pertinent provisions of Charter Sections 187.2, 187 and 187.1 are annexed hereto as Appendix G, H and I, respectively.

Matters Relating to Jurisdiction

Timeliness:

The decisions of the Appellate Department of the Superior Court by which judgments of the trial court in favor of the respective appellants herein were reversed were filed May 6, 1953. Petitions for rehearing were filed in each case by each party plaintiff, respectively, on May 13, 1953, and were denied by the court without opinion on June 4, 1953. Under California practice, the decision of the Appellate Department of the Superior Court became final upon the denial by that court of said petitions for rehearing. (Rule No. 7 of Appellate Division of the Superior Court as amended July 1, 1941.) A petition for appeal in said causes is presented to the presiding judge of the Appellate Department of the Los Angeles Superior Court herewith, to wit, on August 4, 1953, which is within ninety days from the date that said court denied plaintiffs' respective petitions for rehearing, and the decisions became final; these appeals

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are therefore timely. (*Department of Banking v. Pink*, 317 U. S. 264, 63 Sup. Ct. 233, 87 L. Ed. 254.)

Nature of Case:

These cases were originally begun in the Municipal Court, City of Long Beach, County of Los Angeles, State of California, to recover the difference between the amounts which had actually been paid to each plaintiff on account of retirement or death benefits and the amounts which had accrued in their favor, respectively, under the provisions of the statute which were in force at the time plaintiffs' respective rights became vested. In the *Larson* case it was alleged that the plaintiff was the widow of Engebret Larson, deceased, who was killed on February 25, 1942, while performing the duties of his position as a police officer for the defendant City; that prior to his death, said Engebret Larson had been a member of the Police Department of said City for approximately eighteen years, and that the rank held by him on the date of his death, and for several years prior thereto was that of sergeant. By her complaint, Mrs. Larson further alleged that following the death of her husband she brought suit in the Superior Court for the purpose of compelling the defendant City to grant and pay her the widow's pension provided by the terms of Section 187, Subdivision (4) of the Long Beach City Charter, and that such proceedings were duly had and taken in said Superior Court action, that a judgment was duly made and entered therein on September 12, 1944, requiring and compelling the defendant city and its administrative officers to grant to plaintiff a pension dating from February 25, 1942, "in an amount equal to one-half of the salary attached to the rank held by her deceased husband at the time of his death, to wit, that of sergeant in the Long Beach Police Department, and further providing that the same be paid throughout the remainder of her life for the term provided by said Section

187, Subdivision (4)" and that said pension was ultimately granted by the defendant city and its administrative officers after the affirmance of said judgment on appeal by the California District Court of Appeal, which is reported at 71 Cal. App. 2d 60, 162 P. 2d 33.

By her complaint it was further alleged that under the terms of said judgment and the pension granted pursuant thereto, said plaintiff has been and now is entitled to receive from the City of Long Beach a widow's pension in an amount equal to one-half of the salary currently attached to the rank of sergeant in the Long Beach Police Department; that the salary attached to said rank has varied from time to time and that the defendant has paid one-half of the amount of said salary to plaintiff up to and including the month of June, 1951; that the salary attached to the rank of sergeant in the Long Beach Police Department as fixed by the salary ordinance was $371.00 per month as of July 1, 1951, and was raised to $400.00 per month effective July 19, 1951; that following the first day of July, 1951, there has accrued and become payable to the plaintiff on account of said widow's pension the sum of $991.02, which represents one-half of the salary attached to said rank or position, up to and including November 30, 1951; that the defendant has failed and refused to pay to plaintiff any sum in excess of $852.50, on account of the pension payments which accrued to her throughout said period, and that there was then due, owing and unpaid to plaintiff the sum of $138.72 on account of said unpaid pension benefits. Said plaintiff then alleged upon information and belief that the defendant's failure to pay the full amount of said pension benefits was based upon the provisions of Section 187.2 of the City Charter which purportedly became effective June 5, 1951, and by the terms of which the pension benefits payable to plaintiff were purportedly fixed and frozen at the amount being paid to her as a pension on the effective date

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of said amendment. Plaintiff then alleged that "said Section 187.2 is unconstitutional and void insofar as the same purports to alter or modify the vested right of plaintiff to receive an amount equal to one-half of the salary currently attached to the rank of sergeant in the Long Beach Police Department throughout the remainder of her life, so long as she remains unmarried. That plaintiff is wholly dependent upon said pension benefits for her support and maintenance, and that due to the current increase in the cost of living, the moneys being received by her on account of said pension benefits are and will be insufficient to meet her needs unless said payments are permitted to fluctuate in accordance with the salary currently attached to the rank held by her deceased husband, as provided by law at the time said pension was granted. That the purported changes sought to be brought about by the provisions of said Section 187.2 are unreasonable and void insofar as they relate to the obligations upon the part of the defendant to pay said pension benefits to plaintiff, and that the provisions of said Section 187.2 violate the provisions of Art. I, Sections 13 and 16 of the Constitution of the State of California, and of Section 10, Art. I of the Constitution of the United States, as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations." By the prayer of her complaint, said plaintiff sought to recover a money judgment in the sum of $138.72. By its answer the defendant admitted that plaintiff had been granted a pension as alleged in her complaint and that the defendant had paid to plaintiff on account thereof an amount equal to one-half of the salary attached to the rank held by her deceased husband up to the 5th day of June 1951. The defendant, of course, denied that Section 187.2 violated the constitutional provisions above referred to or that it was indebted to the plaintiff in any amount. As previously indicated the trial

court by its judgment impliedly found in plaintiff's favor upon all of the foregoing allegations of her complaint and granted a money judgment in the sum of $256.62, which represented the unpaid pension benefits due plaintiff as of March 31, 1952. (Appendix C.)

In the case of *Russell T. Thompson vs. the City of Long Beach*, plaintiff alleged that he was appointed to a position in the Fire Department of the City of Long Beach, on November 16, 1929, and that he continued to serve as a member thereof up to May 1, 1951, at which time he was granted a retirement pension pursuant to the provisions of Section 187, Subdivision (2) of the Long Beach City Charter. He further alleged in his complaint that in accepting and continuing in said employment with the City of Long Beach, plaintiff relied upon the provisions of said Section 187 and various benefits therein provided, including the right to earn and receive a retirement pension upon the completion of 20 or more years of service as provided by Subdivision (2) thereof; "That during the past 15 years, numerous opportunities of engaging in other employment, which would have paid a higher current rate of compensation than that actually being received by plaintiff from the City of Long Beach, were offered to plaintiff but that in reliance upon the belief that he was earning the right to receive the various benefits specifically provided by said Section 187, plaintiff continued to serve in the Fire Department of the City of Long Beach and refrained from accepting said higher paying employment opportunities." The plaintiff Thompson then alleged that following the adoption of Section 187.1 of the City Charter, which according to its terms purported to repeal said Section 187, he joined with several other persons similarly situated in the filing of a complaint for declaratory relief in the Superior Court of the State of California, in and for the County of Los Angeles, wherein the defendant City of Long Beach was made a defendant;

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that the City appeared and filed an answer and cross-complaint in said action in which it asserted numerous contentions including the contention that plaintiff's pension rights were subject to being modified and reduced by future charter amendments and that such proceedings were duly had and taken in said action that a final judgment and decision was duly made and entered wherein it was finally determined and adjudicated that plaintiff's right to earn and receive the various pension benefits provided by Subdivisions (2), (3) and (4) of said Charter Section 187, "are and were contractual in nature and hence, within the protection of the provisions of Art. I, Sections 13 and 16, of the Constitution of the State of California, and of Section 10, Art. I, of the Constitution of the United States." The Thompson complaint then alleged that plaintiff was granted a retirement pension dating from May 1, 1951, in an amount equal to one-half of the salary attached to the rank of captain in the Long Beach Fire Department; that the salary attached to said rank was raised from $341.00 per month to $371.00 per month as of July 1, 1951, and was duly raised to $425.00 per month effective as of July 19, 1951. The complaint contained similar allegations concerning the City's refusal to pay the total amount which accrued to plaintiff following June 5, 1951, based upon the purported freeze as brought about by said Section 187.2 and specifically alleged the unconstitutionality of said section as being in contravention of the provisions of "Section 10, Art. I of the Constitution of the United States as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations." (Appendix F.) As previously indicated, the trial court found in plaintiff's favor upon all of the foregoing allegations and rendered a money judgment in his favor.

The defendant City took an appeal to the Appellate De-

partment of the Superior Court from the judgment so rendered in each case and that court reversed, impliedly holding that Section 187.2 did not contravene the foregoing constitutional provisions and that said charter section was effective so as to relieve the City of its existing contractual obligation to pay retirement and death benefits to the instant plaintiffs based upon the statutory formula in force at the time the services were performed and at the time the pensions were granted.

How Constitutional Questions Raised

As heretofore stated, plaintiffs in their original complaint in each action specifically alleged that the failure of the defendant City to pay the full amount of pension benefits due each plaintiff was based upon the provisions of Section 187.2 of the City Charter, which purportedly became effective June 5, 1951, and that said Section 187.2 of the City Charter was "unconstitutional and void insofar as it purports to alter or modify the vested right" of each plaintiff to receive the retirement and death benefits in question in accordance with the formula provided for by the statute in force at the time the services were performed and the pension was granted. Furthermore, as we have shown, it was specifically alleged in each complaint that the provisions of said Section 187.2 of the City Charter are and were in "contravention of the provisions of * * * Section 10, Art. I of the Constitution of the United States, as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligation." (See Appendix E and F.) Similar contentions were urged by each plaintiff in their respondents' brief in connection with the appeal by defendant from the favorable judgments of the trial court. Typical of plaintiffs' contentions in this re-

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spect is the following quotation from plaintiff Larson's petition for rehearing, filed in the Appellate Department of the Superior Court, viz.:

> "As previously observed, the Supreme Court of the United States has held on numerous occasions that where a public officer or employee has rendered services pursuant to the terms of a statute which defines the measure of his compensation, there arises as contractual obligation upon the part of the employer to pay 'the amount so fixed'. (*State of Mississippi for the Use of Robertson* v. *Miller, supra.*) Here the court expressly held that a statute which purported to change a measure of his compensation after the services had already been rendered, was invalid as contravening Art I, Section 10 of the United States Constitution. We submit that the holding of the United States Supreme Court in this case and the other cited by respondent in her brief herein is unalterably opposed to any legal theory which would permit the legislature to reduce the measure of compensation due a public employee or his widow after the same has already been completely earned. The very purpose of any statute which specifies the amount of compensation that is to be paid for the performance of given services is to induce the public employee to perform them."

Appellate Department of Superior Court is the Court of Last Resort

The Appellate Department of the Superior Court of the County of Los Angeles, State of California, was the highest court in the State of California, in which a decision could be had in these causes, although such court is not the highest court in the State of California. Under the provisions of Art. VI, Sections 4, 4(b) and 5 of the California State Constitution, the Appellate Department of the Superior Court is given exclusive jurisdiction of appeals

from Municipal Court judgments and no procedure is available under state practice to review or otherwise question the soundnes of the decisions of said Appellate Department of the Superior Court herein in any other state court. (*Herbold* v. *Atchison T. & S. F. Ry. Co.*, 117 Cal. App. 430, 4 P. 2d 184; *Stout* v. *Farwell*, 103 Cal. App. 741, 285 P. 336; *Raisch* v. *Sausalito Land, Etc., Co.*, 131 Cal. 215, 63 P. 346; *Berg* v. *Traeger*, 210 Cal. 323, 292 P. 495.)

The Supreme Court of the United States has held that where a party has exhausted his legal remedies to review an adverse decision before the state court, the appeal may be taken directly to the Supreme Court of the United States, even though the judgment appealed from may be that of an intermediate court of the State. (*Sullivan* v. *Texas*, 207 U. S. 416, 422, 28 S. Ct. 215, 52 L. Ed. 274; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140.)

Statutory Provisions and Decisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked herein under Section 1257 Subdivision (2), of Title 28 of the United States Code. In the case at bar the decision of the Appellate Department of the Superior Court in each case holds that Section 187.2 of the City Charter as adopted June 5, 1951, was effective so as to bring about a substantial impairment of the defendant's contractual obligation to make specified monthly payments to each party plaintiff pursuant to an existing contract with the City, in spite of their timely challenge based upon federal grounds, i.e., that the statute in question contravened Section 10 of Art. I of the United States Constitution, as well as the due process clause of the Fourteenth Amendment thereto. The following decisions sustain the jurisdiction of the United States Supreme Court to review the

respective decisions of the Appellate Department of the Superior Court herein upon a direct appeal:

Chicago B. & Q. R. Co. v. *Illinois ex rel. Grimwood*, 200 U. S.. 561, 26 S. Ct. 341, 50 L. Ed 596;
West Chicago Street R. Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506, 26 S. Ct. 518, 50 L. Ed. 845;
Detroit United Ry. Co. v. *Michigan*, 242 U. S. 238, 37 S. Ct. 87, 61 L. Ed. 268;
Superior Water Light & Power Co. v. *City of Superior, et al.*, 263 U. S. 125, 44 S. Ct. 82, 68 L. Ed. 204;
American Railway Express Co. v. *Levee, supra;*
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 113 A. L. R. 1482;
Millsaps College v. *Jackson*, 275 U. S. 129, 48 S. Ct. 94, 72 L. Ed. 196;
Fox River Paper Co. v. *Railroad Commission*, 274 U. S. 651, 47 S. Ct. 669, 71 L. Ed. 1279;
Georgia Railway & Power Co. v. *Decatur*, 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065.

Substantial Federal Questions Are Presented

The principal issue presented in the cases at bar, namely, whether the performance of services, the submission to salary deductions, and the forbearance of accepting other higher-paying employment opportunities by a public employee in reliance upon the terms of a statute which offers to pay specified retirement, disability and death benefits in consideration for the performance of a given number of years of service in certain hazardous occupations, ripens into a contractual right upon the part of the employee and his dependents to receive the specific annuity so promised upon the happening of the contingency which calls for payment (service-connected death, disability or retirement for length of service), which is protected by the contract and due process clauses of the Federal Constitution against

impairment by subsequent legislative action upon the part of the state,—is one of nationwide importance. The well recognized economic advantages attributable to the establishment of a satisfactory system for inducing competent employees to enter and remain in the service of the employer during the productive years of his life and for the retirement of superannuated employees, has prompted many employers, both governmental and private, to adopt systems similar to that contained in the Long Beach City Charter. The principal function of such a plan, as observed by the California Supreme Court in the case of *Kern* v. *City of Long Beach* (1947), 29 Cal. 2d 848, 179 P. 2d 799, 803, "is to induce competent persons to enter and remain in public employment."

While the California courts have experienced some difficulty in defining the vested nature of the right of the employee or his widow to receive death or disability benefits prior to the happening of the contingency which calls for payment (*Pennie* v. *Reis* (1899), 80 Cal. 266, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426; *Brooks* v. *Pension Board* (1938), 30 Cal. App. 2d 119, 85 P. 2d 956; *Brophy* v. *Employees Retirement System* (1945), 71 Cal. App. 2d 455, 162 P. 2d 939), they have long recognized the realistic fact that the offer embodied in such a statute actually becomes an integral part of the contract of employment (*O'Dea* v. *Cook* (1917), 176 Cal. 659, 661, 169 P. 366; *Whitehead* v. *Davie*, (1922) 189 Cal. 715, 717, 209 P. 1009; *Dryden* v. *Board of Pension Commissioners* (1936), 6 Cal. 2d 575, 579, 59 P. 2d 104; *England* v. *City of Long Beach, et al.* (1946), 27 Cal. 2d 343, 163 P. 2d 855; *Holt* v. *Board of Police & Fire Pension Commissioners of the City of Long Beach* (1948), 36 Cal. App. 2d 714, 196 P. 2d 94), and that after the happening of the contingency which entitles the employee or his dependents to receive payment, there arises a vested

contractual right upon the part of the employee or his dependents to receive such payments in accordance with the terms of the statute then in force, which is protected by Art I, Section 10 of the Federal Constitution. (*Kavanagh* v. *Board of Police Fund Comm'rs.* (1901), 134 al. 50, 66 P. 36; *Pennie* v. *Reis, supra; Sunder* v. *Collins* (1933), 219 Cal. 430, 27 P. 2d 382; *Vero* v. *Sacramento City Employees,* (1940) 41 Cal. App. 2d 482, 107 P. 2d 82; *England* v. *City of Long Beach, supra.*)

In *Kavanagh* v. *Board of Police Pension Fund Commissioners, supra,* the California Supreme Court, in holding that the widow of a deceased police officer was entitled to receive a death benefit pension based upon the statutory formula in force at the time of her husband's death as opposed to the formula provided for by a subsequent amendment thereto, at page 52 said:

> "• • • Respondent's right therefore became vested while the statute under which she claims was in full force, and it was not competent for the legislature, or any other authority, to deprive her of that vested right. (Pennie v. Reis, 132 U. S. 471.)"

A concise statement of the principle which applies to the facts presented in the case at bar is found in *Vero* v. *Sacramento City Employees Retirement System, supra,* wherein the court at page 34 of the Pac. Rep. said:

> "• • • Where a widow is granted a definite and unqualified pension, then, 'upon the happening of the contingency the right to a pension becomes vested and may not be impaired by subsequent action of the legislature, or other authority.' 20 Cal. Jur. 998; Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, 190 P. 51; Klench v. Board, etc., 79 Cal. App. 171 249 P. 46; O'Dea v. Cook, 176 Cal. 658, 169 P. 366."

Similarly, in *Sunder* v. *Collins, supra,* Justice Curtis in his concurring opinion, at page 383 of the Pac. Rep. said:

> "I concur in the decision on the ground that the intervener was granted his pension under the old charter of the city and county of San Francisco, which placed no limitations nor restrictions upon his right to receive and enjoy said pension, like or similar to those contained in Section 163 of the present charter. *This was a vested right, and the municipality could not by subsequent action, either through a charter provision or otherwise, divest him of this right, nor attach any burden thereto not provided for by the charter in effect at the time said pension was granted.* Kavanagh v. Board of Police D. F. Com'rs, 134 Cal. 50, 66 P. 36; 20 Cal. Jur. 999." (Emphasis mine.)

An analogous situation was before the Supreme Court of Florida in the recent case of *State ex rel Warren* v. *City of Miami,* 15 So. 2d 449. There the widow had been granted a pension in the sum of $75.00 per month in accordance with the statute in force at the time of her husband's death. Later the statute was repealed and a new statute adopted which purported to allow payments of only $50.00 per month as a widow's pension. There, as here, the widow had previously been granted a peremptory writ of mandate, ordering the City to pay her $75.00 per month until she died or remarried. The appeal was from an order made later in the same mandamus proceedings, which purported to reduce the obligation of the City to $50.00 per month in accordance with the new statute. At page 450 the Florida Supreme Court, in reversing the decision, said:

> "In the case at bar the policeman died on October 1, 1938; he made monthly contributions to the pension fund; he was a member of the Miami police force; he left a widow. It is observable that the contingencies provided by Chapter 15338 for the maturity of the pension fund occurred prior to January 1, 1940, when

> the second pension became effective. In the case of Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426, the court held that on the happening of the enumerated events or the several contingencies the right to participate in the specific fund became vested in the officer or his representative; that a change in the law providing for pensions to policemen cannot deprive the widow of the deceased policeman of her right to the pension which vested in her upon the death of the husband, all of which happened before a change in the pension law." (Citing many authorities.)

To the same effect, see *Anglin* v. *Bender*, 207 Ga. 108, 60 S.E. 2d 756, cert. den. 340 U. S. 878, 71 S. Ct. 125.

The principles announced in the foregoing decision are in accord with the holding of this court in the cases of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 113 A. L. R. 1482; *State of Mississippi for the Use of Robertson* v. *Miller*, 276 U. S. 174, 72 L. Ed. 517; *Pennie* v. *Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426; *State of Louisiana* v. *Fisk*, 116 U. S. 131, 29 L. Ed. 587; *Ettor* v. *City of Tacoma*, 228 U. S. 143, 33 S. Ct. 428, 57 L. Ed. 773; *Lynch* v. *United States*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434.

As observed by the United States Supreme Court in the case of *State of Mississippi for the Use of Robertson* v. *Miller, supra*, the principle which supports the right of the legislature to modify the future duties and compensation payable to a public officer or employee will not support any attempted modification which mitigates against his contractual right to receive compensation for services already performed in accordance with the formula provided for by the statute at the time the services were rendered. At page 520, the court in discussing this problem, said:

> "It is well understood that the contract clause does not limit the power of a state during the terms of its officers to pass and give effect to laws prescribing for

the future the duties to be performed by, or the salaries or other compensation to be paid to them. Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472. *But after services have been rendered by a public officer under a law, specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed.* * * * *The retroactive application of Chap. 170 would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions.* The case is ruled by Fisk v. Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587, 6 Sup. Ct. Rep. 329." (Emphasis mine.)

Accordingly the court held that the state official was entitled to enforce payment of certain contingent compensation in accordance with the formula provided for by the statute at the time the services were rendered, and that his contractual right to receive "the amount so fixed" by said statute could not be impaired by subsequent legislation.

In the cases at bar it is conceded that statute (Section 187 of the Charter) which was in force and effect at the time the services were rendered and the events occurred which entitled plaintiffs respectively to receive lifetime annuities provided for the making of regular monthly payments based upon a definite percentage of the salary currently attached to the rank held at the time of retirement, i.e., monthly payments which fluctuated in accordance with the salaries currently paid to employees holding the same rank. It was also conceded that the city had paid these fluctuating monthly payments up to and including June 5, 1951, the date of the enactment of Section 187.2 which purported to freeze all such payments at the amounts which the city happened to be paying on the effective date of the statute. It is also conceded that immediately after the

questioned amendment became effective, the current salaries attached to the positions in question were substantially raised and hence, that the practical effect of the statute was to substantially reduce the monthly benefits which would otherwise have been payable to appellants in accordance with their vested contractual right.

It requires little argument to demonstrate the fact that the right to receive an annuity which fluctuates with the salary currently attached to the rank held by the employee at the time of his death or retirement is a valuable right, because it tends to adjust the monthly payments to the current value of the dollar. In *Casserly* v. *City of Oakland*, 6 Cal. 2d 64, 56 P. 2d, 237, the California Supreme Court in outlining the purpose of a charter section which called for the payment of retirement benefits based upon a certain percentage of the salary attached to the rank held for one year at the time of retirement in language identical to that employed in Section 187 of the Long Beach City Charter, at page 239 of the Pacific Reporter said:

> "But aside from the adjudicated cases, it appears that the language is admirably suited to accomplish justice for retired officers, as well as for the city. *The cost of living and the value of money fluctuate, as indicated by the three raises in salaries of officers since Casserly and Sherry were originally appointed, and by the present reduction, brought about by the emergency which has been found to exist. A pension measured by the pay of officers of similar rank inures to the benefit of pensioners, when the value of money is low and the pay increased, but no injustice is done to the city and its tax-payers if, by the increase in the value of money and an emergency, it feels compelled to reduce the cost of government.*" (Emphasis mine.)

Accordingly the court held that the retired employees were only entitled to receive monthly payments based upon

the reduced amounts that were then being paid to employees holding comparable positions, because this was "in strict accord with the compensation agreement." (Pac. Rep. p. 239.) The only difference between the facts presented in the cases at bar and those which were before the California Supreme Court in the *Casserly* case is that here the current salaries attached to the positions in question have been raised, and plaintiffs are merely seeking to be paid "in strict accord with the compensation agreement."

The mere fact that Section 187 of the Charter uses the term "pension" in defining the monthly payments or annuities that become payable to the employee or his widow upon the happening of the contingencies mentioned in the statute does not prevent a contract from arising. The true distinction between the contractual obligation which is created by the performance of services in reliance upon the offer as contained in a statutory enactment which provides for the payment of a stipulated annuity upon the completion of a specific number of years of service, and the non-contractual or gratuitous payments which are ofttimes provided for by statute in recognition of past services, was recognized by this court in the case of *Dismuke* v. *United States*, 297 U. S. 167, 56 S. Ct. Rep. 400, 80 L. Ed. 561. In holding that the Federal District Court had jurisdiction to entertain the case and hence, that the United States Supreme Court had jurisdiction to entertain the appeal, the court speaking through Justice Stone at page 564 said:

> "* * * The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term 'pensions' commonly referred to the gratuities paid by the government in recognition of past services in the Army

or Navy. *The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by employees, in recognition of both of their past services and of services to be performed.*" (Emphasis mine.)

The same distinction was recognized by the California Supreme Court in *Gibson* v. *City of San Diego*, 25 Cal. 2d 930, 156 P. 2d 739, at page 937, viz.:

> "As observed by this court in O'Dea v. Cook (1917), 176 Cal. 659, 661 (169 P. 366), 'A pension such as this law contemplates is not a gratuity or a gift. . . . (W)here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.' And in Klench v. Pension Fund Commissioners (1926), supra, 79 Cal. App. 171, 185, the court said: '*A pension is a gratuity only where it is granted for services previously rendered which, at the time they were rendered, gave rise to no legal obligations.* (Citations) . . . *And herein lies an important distinction between pension laws which, like those we now have before us, provide for pensions for services performed for the government or disabilities occurring while rendering such services after the law has been passed, and a pension system designed to care for or reward soldiers for disabilities suffered or services rendered in the past.* . . .'" (Emphasis mine.)

The fact that the term "pension" is used to describe the benefits payable does not of course mitigate against the true nature of the payment. The term has been variously used to define any periodical payment that is made by the government to retired officers or employees and to

the widows and children of men killed in government service. (See New Twentieth Century Dictionary.)

Speaking of a similarly worded statute, the Pennsylvania Court in *Kelly* v. *Loveland,* 141 P. Super. 455, 15 Atl. 411, at page 415 said:

> "• • • This ordinance, in spite of the use of the misleading term 'pension,' throughout its provisions in legal contemplation creates what might more accurately be denominated a retirement fund. The 'pension' payable to eligible employees is not a mere gratuity or bounty, but is earned compensation arising out of a contract right."

Similarly in *Bausewine* v. *City of Philadelphia Police Pension Fund Assn.,* 237 Pa. 267, 10 Atl. 2d 446, the court at page 447 said:

> "• • • Regardless of the fact that the Association designated its fund as a 'pension' fund, and the payments upon retirement to those entitled thereto 'pensions,' there can be no doubt that the fund is a retirement fund and the payments retirement pay; as such they represent in part adjusted compensation."

To the same effect see:

Kern v. *City of Long Beach, supra;*
Quam v. *City of Fargo* (1950) N.D.), 43 N.W. 2d 292, 296;
Mattson v. *Flynn,* 216 Minn. 354, 13 N.W. 2d 11, 15;
Cobbs v. *Home Ins. Co.,* 18 Ala. App. 206, 91 So. 627, 629.

In the last cited case the court, in referring to a statute which used the term "pension" said: "The compensation thus paid, by whatever name called, is not a gratuity, but a part of the stipulated consideration for which they contracted and served."

In reversing the respective judgments of the Municipal

Court, by which it had been determined that the 1951 amendment to the Long Beach City Charter was in contravention of Art. I, Section 10 of the Federal Constitution, the Appellate Department of the Superior Court apparently relied upon certain general language as first used by the California Supreme Court in the cited case of *Kern* v. *City of Long Beach,* and as reiterated in three other cases cited in the opinion, viz:

> "Ordinarily an opinion of an appellate court is valued for the principles determined, not for those discussed but not involved. Such is the character of the opinion written by the Chief Justice and concurred in by the entire court, in *Kern v. City of Long Beach* (1947), 29 Cal. 2d 848, 179 P. 2d 799, that we deem not only the precise question before the court was answered by the opinion, but that it was patently intended to be and should be taken by us to furnish authoritative answers to the other questions discussed as well. There are three pertinent decisions since the *Kern case: Packer v. Board of Retirement* (1950), 35 Cal. 2d 212, 217 P. 2d 660; *Palaske v. City of Long Beach* (1949), 93 Cal. App. 2d 120, 208 P. 2d 764; *Allen v. City of Long Beach* (1950), 101 Cal. App. 2d 15, 224 P. 2d 792. After reading the opinions in these four cases we have no hesitancy in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner, so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension."

In all of the cases so cited, however, the California court was concerned solely with the question of whether the legislature could repeal or modify the provisions of a statute which provided for a retirement system as it applied to

employees *who had not as yet become eligible for retirement.* When correctly read, in the light of the issues presented, it is submitted that none of the authorities support the holding for which they are cited and in reality support the holding of the trial court in the cases at bar. In the cited case of *Kern* v. *City of Long Beach,* the court was concerned with the validity of Section 187.1 of the Charter which purportedly became effective March 29, 1945, and purported to repeal the entire pension system as created by Section 187, except for the proviso which permitted employees that were then eligible for retirement to apply for and receive their pension within a period of five years. (Appendix I.) The proceeding was an original application for a writ of mandate to compel the granting and payment of a pension to the petitioner Kern who had then completed 20 years of employment but who lacked some 32 days of completing said minimum period of service at the time the statute became effective. As phrased by the court at page 800 of the Pac. Rep.:

> "The question to be determined is whether petitioner acquired a vested right to a pension which the city could not abrogate by repealing the charter provisions without impairing its obligation of contract.
>
> "The nature and extent of the city's obligation must be ascertained not only from the language of the pension provisions but also from the judicial construction of this or similar legislation at the time the contractual relationship was established. See Warburton v. White, 176 U. S. 484, 495, 20 S. Ct. 404, 44 L. Ed. 555; Ennis Water Works v. City of Ennis, 233 U. S. 652, 657-658, 34 S. Ct. 767, 58 L. Ed. 1139; cf. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 361-362, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254; Coombes v. Getz, 285 U. S. 434, 445, 451, 52 S. Ct. 435, 76 L. Ed. 866; Wood v. Lovett, 313 U. S. 362, 370, 61 S. Ct. 983, 85 L. Ed. 1404; Rottschaeffer, Constitutional Law (1939) 560. * * *"

After pointing out that in some states, pensions for government employees are treated as gratuities or bounties which could be withdrawn at any time, but that the rule was otherwise in California, the court at page 801 said:

> "*It is settled in this state that pension rights acquired by public employees under statutes similar to the Long Beach charter become vested as to each employee at least on the happening of the contingency upon which the pension becomes payable.* Kavanagh v. Board of Police Pension Fund Com'rs, 134 Cal. 50, 66 P. 36; McCarthy v. City of Oakland, 60 Cal. App. 2d 546, 550, 141 P. 2d 4; see Gibson v. City of San Diego, 25 Cal. 2d 930, 936-937, 156 P. 2d 737; Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal. 2d 356, 361, 110 P. 2d 37; Klench v. Board of Pension Fund Com'rs, 79 Cal. App. 171, 182, 249 P. 46; see, also, England v. City of Long Beach, 27 Cal. 2d 343, 63 P. 2d 865; City of Long Beach v. Lentz, 27 Cal. 2d 890, 165 P. 2d 677." (Emphasis mine.)

The court then proceeded to discuss some of the early California cases which had held that the employee and his dependents had no vested right to receive the benefits promised until the happening of the contingency which called for payment, and by way of summary at page 803 said:

> "Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.

"Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. See Dryden v. Board of Pension Com'rs, 6 Cal. 2d 575, 579, 59 P. 2d 104; French v. French, 17 Cal. 2d 775, 777, 112 P. 2d 235. He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made as a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and *the employing government body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen,* since a part of the compensation which the employee has at that time earned consists of his pension rights.

"To hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employment. * * *"
(Emphasis mine.)

In conclusion the court at pages 803 and 804 said:

"Accordingly, we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner. Indiana ex rel. Anderson v. Brand,

303 U. S. 95, 58 S. Ct. 443, 83 L. Ed. 685, 113 A. L. R. 1482; cf. Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434; Perry v. United States, 294 U. S. 330, 349 et seq., 55 S. Ct. 432, 790 L. Ed. 912, 95 A. L. R. 1335."

When viewed in the light of the issues presented and the actual holding of the court, it is obvious that the court did not intend by the foregoing discussion to overrule the "settled" rule "in this state *that pension rights acquired by public employees under statutes similar to the Long Beach Charter become vested as to each employee at least on the happening of the contingency upon which the pension becomes payable.*" In fact, an examination of the briefs in the *Kern* case will reveal that the City had conceded this point and, as observed by the Court at page 801 of its opinion, "It is contended by the City, however, that petitioner did not acquire any vested right to a pension because he did not complete the prescribed period of service prior to the time the pension provisions were repealed." This fact is further manifested by the following quotation from the opinion in the *Kern* case at page 802, viz.:

> "• • • Although there may be no right to tenure, public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. Since a pension right is 'an integral portion of contemplated compensation' (Dryden v. Board of Pension Com'rs, 6 Cal. 2d at page 579, 59 P. 2d 104), it cannot be destroyed, once it has vested, without impairing a contractual obligation. • • •"

When the court remarked that the "*employee* does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension," it was obviously attempting to announce a principle which would protect the employee who had not as yet become eligible for retire-

ment as against any legislative enactment, (such as the attempted repeal) which would unreasonably interfere with his future right to mature his retirement pension, and at the same time give recognition to the settled principle that the future duties and compensation of a public officer or employee were at all times subject to modification. All that the court intended to determine in the *Kern* case was that upon acceptance of employment in reliance upon a statutory offer to pay specified retirement benefits, there arose a quasi-contractual obligation upon the part of the City which could not be entirely abrogated by a repeal of the statute without perpetrating a fraud upon the employee, because he had earned some pension rights after he had performed substantial service for the City. The court then went on to point out (speaking of the same right) that while a contractual relationship did exist, the employee had no vested right to receive any specified pension because of the City's inherent right to change his future compensation (including that portion of his future compensation which was represented by his unearned pension); hence, the principle was evolved that prior to the completion of his contract, his pension rights were subject to reasonable modification. The court expressly refrained from discussing the "permissible scope" of such changes as could be made, observing: "The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions." (p. 803.) "It is elementary that the language used in an opinion is to be understood in the light of the facts and the issue then before the Court." (*Porter* v. *Bakersfield & Kern Electric Railway Co.*, 36 Cal. 2d 582, 225 P. 2d 223.)

In the cited case of *Parker* v. *Board of Retirement* (1950), 35 Cal. 2d 212, 217 P. 2d 660, the court was again concerned with the validity of an amendment as it applied to em-

ployees who were not then eligible for employment. The modification was approved because, as observed by the court at page 664 of its opinion, "The basic conditions under which a county peace officer could obtain a pension were substantially unchanged." The court was not even concerned with an attempt to modify a pension that had already been granted, and hence the opinion provides no support for the holding of the Appellate Department of the Superior Court in the cases at bar. The same is true of the other two cases cited.

In all events it is apparent that the holding of the Appellate Department of the Superior Court in the cases at bar is clearly at variance with the principle announced by the United States Supreme Court that after services have been rendered pursuant to a statute which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate which cannot be impaired by a subsequent legislative enactment without violating the due process and contract clauses of the Federal Constitution. (*State of Mississippi ex rel. Robertson* v. *Miller, supra; State of Louisiana* v. *Fisk*, 111 U. S. 131, 29 L. Ed. 587; *Ettor* v. *City of Tacoma*, 228 U. S. 143, 33 S. Ct. 428, 57 L. Ed. 773; *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wal. 450, 17 L. Ed. 805.)

In the case of *State of Louisiana* v. *Fisk, supra*, the United States Supreme Court at page 588 said:

> "After the services have been rendered, under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protective power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agree-

ments; and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note."

Similarly the Supreme Court of Michigan in the case of *Ramey* v. *State*, 296 Mich. 449, 296 N.W. 323, in holding that plaintiffs could not be prejudiced in their right to recover compensation for unused vacation allowances by reason of a statutory amendment which was adopted after they had completed their part of the contract, at page 326 said:

"Under the facts in this case, plaintiffs had performed all acts necessary to insure to themselves the right of a vacation with pay, or if dismissed before exercised, to receive compensation for the unused portion of their annual leave allowances. There was nothing remaining for them to do except exercise the right which depended on no contingency, but was complete and matured. In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered. It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation. Fisk v. Jefferson Police Jury, 116 U. S. 131, 6 S. Ct. 329, 29 L. Ed. 587; Robertson v. Miller, 276 U. S. 174, 48 S. Ct. 266, 72 L. Ed. 517.

"In Thomas v. Hoss, 143 Or. 41, 21 P. 2d 234, 236, it is said: '* * * it is settled that, after a salary has been earned, the public employee's right thereto becomes vested and cannot be taken away by any legislation thereafter enacted."

As observed by the California Supreme Court in the case of *Gibson* v. *City of San Diego* (1945), 25 Cal. 2d 930, 156

P. 2d 737, 741, in construing a similar charter provision after "the employee has completed his period of service," the municipality "has no right to his return because it has no right to further service from him. He has fully earned his pension." To the same effect see *Dierkes* v. *City of Los Angeles, et al.*, (1945), 25 Cal. 2d 938, 156 P. 2d 741.

Similarly, the Supreme Court of Utah, speaking through Chief Justice Wolfe in his concurring opinion, in the case of *Driggs* v. *Utah Teachers Retirement Board*, 145 Utah 417, 142 P. 2d 657, at page 665 analyzes the legal result of the situation presented in the case at bar as follows:

> "When the employer promises to his employee prospective periodic payments to commence after a certain term of service and upon the fulfillment of other conditions, it constitutes an offer which ripens into a contract upon the fulfillment of the conditions; the fulfillment of the conditions which brings the contract into being at the same time constitutes a performance of said contract on the part of the employee. This is true in principle whether it is the State or a private party which makes the promise or holds out the inducement."

Essentially the same principle was approved by the Supreme Court of the United States in the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 112 A. L. R. 1482, at page 1485, viz.:

> "• • • it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, becomes contracts between them and the State or its subdivisions within the protection of Article I, sec. 10. If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature. • • •

"On such a question, one primarily of state law, we accord respectful consideration and great weight to the view of the State's highest court but, *in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.*" (Emphasis added.)

Accordingly, the court held that an amendment to a school teacher tenure statute which purported to eliminate from its application such teachers as were employed in certain township schools was ineffective insofar as it related to teachers who came within the purview of the act prior to such amendment.

The general principle that the contractual obligations of a municipality are governed by the same principles that apply to contracts between individuals is firmly established by the following California decisions:

Denio v. *City of Huntington Beach*, 22 Cal. 2d 580, 140 P. 2d 392;

Pacific Finance Corp. v. *Lynwood*, 114 Cal. App. 509, 300 P. 50;

Brown v. *Town of Sebastopol*, 153 Cal. 704, 96 P. 363;

Corp. of America v. *Durham, etc., Co.*, 50 Cal. App. 2d 337, 340, 123 P. 2d 81;

Brown v. *Bd. of Education*, 103 Cal. 531, 534, 37 P. 503;

Irvine v. *Reclamation Dist. No. 108*, 24 Cal. 2d 468, 150 P. 2d 428;

Floyd v. *Blanding*, 54 Cal. 41, 45.

It is likewise firmly established that the obligation of a contract is impaired by any law which renders it less valuable to the payee.

Brown v. *Ferdon*, 5 Cal. 2d 226, 54 P. 2d 712;

Islais Co. Ltd. v. *Matheson*, 3 Cal. 2d 762, 45 P. 2d 332;

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Indiana ex rel. Anderson v. *Brand, supra;*
Lynch v. *United States,* 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434;
Sutter Basin Corp. Ltd. v. *Brown, et al.* (1953), 40 Adv. Cal. 239, 253 P. 2d 649;
Fortinberry Co. v. *Blundell* (Okla. 1952), 242 P. 2d 427;
McCracken v. *Hayward* (1844), 2 How. 608, 612, 11 L. Ed. 397;
Clarke v. *Ireland, et al.* (1948), 122 Mont. 246, 199 P. 2d 965;
W. B. Worthen Co. v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298;
W. B. Worthen Co. v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344.

As pointed out by the United States Supreme Court in the early case of *McCracken* v. *Howard, supra,* "the obligation of a contract, consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. *There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force.* If any subsequent law affects to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence, any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to

act only on the remedy, is directly obnoxious to the prohibition of the Constitution." (Emphasis added.)

Carried to its logical conclusion the holding of the Appellate Department of the Superior Court in the cases at bar would render meaningless and indefinite the vested contractual obligation which concededly results from the fulfillment by a municipal employee of the conditions which entitle him to receive a retirement annuity. If, instead of being entitled to receive the specific benefits promised by the terms of the statute which are in force at the time the services are performed and the contingency calling for payment occurs, the employee and his widow are merely entitled to receive such an amount as may be determined by some future legislative body and the court, to be "substantial and reasonable", the constitution inhibition against the impairment of contractual obligations would be completely nullified. If the City's obligation can be changed from one to pay a given percentage of the salary currently attached to the rank held for one year at the time of retirement (a formula specifically designed to keep the monthly payments adjusted to the current value of the dollar) to what some future legislative body may determine to be substantial and reasonable at that time, there is no reason why the same cannot be reduced to $100.00 a month, $75.00 a month, or even $50.00 per month. In the case at bar the modification in question resulted in a monthly reduction of approximately $25.00 the following month, and today amounts to a reduction of approximately $50.00 per month when measured by the salary currently attached to the rank held at the time the contingency occurred which entitled plaintiffs respectively to receive their annuities. As previously observed the formula originally provided in Section 187 of the Charter was specifically designed to provide for the payment of an amount that would provide for the living expenses of the retired employee and/or his dependents

when measured in terms of the current value of the dollar. In the case of *Casserly* v. *City of Oakland*, 6 Cal. 2d 64, 56 P. 2d 237, the California Supreme Court expressly approved the reasonableness of this type of a formula and pointed out that a reduction in pension benefits which was brought about by a reduction in the current rate of the salary was strictly in accord with the terms of the contract. "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." (48 Harvard L. Rev. 1299.)

If, on the other hand, the retired employee and his widow are merely entitled to receive such an amount as some future legislative body may determine to be reasonable and substantial, who is to be the judge of the reasonableness of the amount thus provided? Is it a question of fact to be determined by the trial court? If so, the trial court in the case at bar impliedly found that "the purported changes sought to be brought about by the provisions of said Section 187.2 are unreasonable and void, insofar as they relate to the obligation upon the part of the defendant to pay benefits to plaintiff" Larson. The trial court also found by implication that said "plaintiff is wholly dependent upon said pension benefits for her support and maintenance, and that due to the current increase in the cost of living, the moneys being received by her on account of such pension benefits are and will be insufficient to meet her needs unless such payments are permitted to fluctuate in accordance with the salary currently attached to the rank held by her deceased husband, as provided by law at the time said pension was granted." (Appendix E, p. 3; *Mistrofini* v. *Swanson*, 114 A.C.A. Sub. 567, 250 P. 2d 764.) If the question of reasonableness is one of fact, surely the trial court's

findings supported by substantial evidence are binding upon the Appellate Court. (*U Drive & Tour, Ltd.* v. *System Auto Parts, Ltd.*, 28 Cal. App. 2d Supp. 782, 786, 71 P. 2d 354; *Mistrofini* v. *Swanson, supra.*)

Where, as here, however, the statute in force at the time the services were rendered and the contingency occurred which entitled the employee or his dependent to receive payment set forth a specific formula for determining the amount to be paid, it is submitted that a completed contract came into existence and that there arose a contractual obligation upon the part of the City to pay "the amount so fixed." (*State of Mississippi for the Use of Robertson* v. *Miller, supra; State of Louisiana* v. *Fisk, supra; Indiana ex rel. Anderson* v. *Brand, supra.*) In these cases the United States Supreme Court has held that a statute which purported to change the measure of compensation payable to the employee after the services had already been rendered, was invalid as contravening Art. I, Section 10 of the United States Constitution. We submit that the principles announced in these cases are unalterably opposed to any legal theory which would permit the legislature to reduce the measure of compensation payable to a public employee or his widow after the same has already been completely earned. The very purpose of any statute which specifies the amount of compensation that is to be paid for the performance of given services is to induce the public employee to perform them; to indulge in the legal fiction that such an employee is not entitled to receive the specific compensation so promised after he has completed his part of the bargain, and that he is only entitled to receive such compensation as some future legislature may determine to be "reasonable and substantial" does not comport with the realities of the situation and is tantamount to the perpetration of a fraud upon the em-

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ployee. The adoption of such a principle is contrary to the fundamental purpose of Art. I, Section 10 of the United States Constitution and would clearly render it a "dead letter" if permitted to stand. *(Indiana ex rel. Anderson* v. *Brand, supra.)*

We likewise submit that the Appellate Department of the Superior Court erred in concluding that the nature and extent of the contractual obligation which existed between the plaintiff Thompson and the defendant City had not already been conclusively determined by the former judgment in declaratory relief, to which each were parties. As heretofore observed, the court expressly found that Thompson had relied upon the specific retirement benefits offered by Charter Section 187 in accepting and continuing his employment with the City, that he had made salary contributions to the fund from which the pensions were to be paid and that he had refrained from accepting other higher-paying employment opportunities in reliance upon the belief that he was earning the right to receive the specific retirement benefits as provided for by the charter. By its final decree the court further determined that his right to earn and receive said retirement and disability benefits was "contractual in nature and, hence, within the protection of the provisions * * * of Section 10 of Art. I of the Constitution of the United States, as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations, provided, however, that said contractual rights are limited, with respect to a retirement pension, to an annual pension equal to one-half of the salary attached to the rank held by such plaintiff or plaintiffs one year prior to the date of their respective retirements, and no more." (Exhibit A to Appendix F, p. 4.)

The law appears to be well settled in California that the future rights of the parties may be properly determined by a declaratory judgment where such determination is necessary in order to dispose of the existing controversy as presented by the pleadings and that the court's determination thereof is re adjudicata in any subsequent litigation between the same parties relating to the same right.

Rolapp et al. v. *Federal Building and Loan Association*, 11 Cal. App. 2d 237, 53 P. 2d 974;

Knox v. *Wolfe*, 73 Cal. App. 2d 494, 157 P. 2d 3;

Denio v. *City of Huntington Beach*, 74 Cal. App. 2d 424, 168 P. 2d 785;

Price v. *Sixth Dist. Agricultural Assn.*, 201 Cal. 502, 258 P. 387.

The rule is also well settled that the doctrine of res adjudicata applies as well to the determination of questions of law as it does to questions of fact.

Olwell et al. v. *Hopkins et al.*, 28 Cal. 2d 147, 168 P. 2d 972;

Price v. *Sixth Dist. Agricultural Assn.*, 201 Cal. 502, 258 P. 387;

Denio v. *City of Huntington Beach, supra.*

The California court having expressly determined that the right to receive the specific retirement benefits provided for by Section 187 of the City Charter was contractual in nature and within the protection of Art. I, Section 10 of the Federal Constitution, it is obvious that the Appellate Department of the Superior Court in the case at bar erred in holding that said vested contractual right could be modified by a subsequent statutory amendment which had the

practical effect of materially reducing the same, after complete performance upon the part of the employee.

State of Mississippi for the Use of Robertson v. *Miller, supra;*

Coombes v. *Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866;

Lynch v. *United States*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434.

In *Lynch* v. *United States, supra,* the court was concerned with the force and effect of the so-called Economy Act of 1933 which purported to repeal "all laws granting or pertaining to yearly renewable term insurance." After observing that although these policies of war risk insurance were not entered into for gain, they were nevertheless "legal obligations of the same dignity as other contracts of the United States", because of the fact that the beneficiary had paid a consideration therefor, the United States Supreme Court at page 579 said:

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

Conclusion

Wherefore, it is respectfully submitted that the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of said Court, because the Appellate Department of the Superior Court of the County of Los Angeles, State of California, has disposed of important and substantial federal questions in a manner that is in conflict with the Constitution of the United States and the applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

KENNETH SPERRY,
JOHN CHARLES SPENCE, JR.,
Attorneys for Plaintiffs-Appellants.

APPENDIX A

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. Civ. A-8063

Trial Court No. 74,714

CECELIA S. LARSON, Plaintiff and Respondent,

vs.

CITY OF LONG BEACH, ETC., Defendant and Appellant.

MEMORANDUM OPINION

Appeal by defendant from a judgment made by the Municipal Court of the Long Beach Judicial District, Percy Hight, Judge.

Reversed.

For Appellant: Irving M. Smith, City Attorney, Clifford E. Hayes, Deputy City Attorney.

For Respondent: Kenneth Sperry, Esq.

A sergeant of the police force of the defendant city met his death on the performance of his duty in 1942, and his widow, the plaintiff in this action, became entitled to a pension of one-half of the salary currently being paid a sergeant of the police force. (*Larson* v. *City of Long Beach* (1945), 71 Cal. App. 2d 60, 162 P. 2d 33). In 1951 the pension provisions of the Long Beach charter were so amended that, if effective, they operated to freeze the pension at the rate fixed at the date of the amendment (Stats. 1951, p. 4635.) The pay of a sergeant has been increased since the amendment, and plaintiff, taking the position that she had a vested right to a pension according to the charter provisions in effect at her husband's death, sought and obtained a judgment upon the basis of the increased compensation. We are reversing the judgment.

Ordinarily an opinion of an appellate court is valued for the principles determined, not for those discussed but not involved. Such is the character of the opinion written by the Chief Justice and concurred in by the entire court, in *Kern* v. *City of Long Beach* (1947), 29 Cal. 2d 848, 179 P. 2d 799, that we deem not only the precise queston before the court was answered by the opinion, but that it was patently intended to be and should be taken by us to furnish authoritative answers to the other questions discussed as well. There are three pertinent decisions since the *Kern* case: *Packer* v. *Board of Retirement* (1950), 35 Cal. 2d 212, 217 P. 2d 660; *Palaske* v. *City of Long Beach* (1949), 93 Cal. App. 2d 120, 208 P. 2d 764; *Allen* v. *City of Long Beach* (1950), 101 Cal. App. 2d 15, 224 P. 2d 792. After reading the opinions in these four cases we have no hesitancy in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner, so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension.

The complaint seeks a money judgment. It is an ordinary action at law for an amount claimed to be due. The effect of the judgment, ultimately to be rendered, upon the legal questions that have arisen in the case, is determined by the principles governing judgments, and that it has some effect does not convert this action at law into one for a declaratory judgment, not within the jurisdiction of the trial court. (See *Simpson* v. *Security-First Nat. Bank* (1945), 71 Cal. App. 2d 154, 157, 162 P. 2d 494, 495.)

The judgment is reversed.

Dated May 6, 1953.

BISHOP,
Judge.

I concur. Shaw, Presiding Judge.

APPENDIX B

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Superior Court No. Civ. A 8064

Trial Court No. 75,161

RUSSELL T. THOMPSON, Plaintiff and Respondent

vs.

CITY OF LONG BEACH, ETC., Defendant and Appellant

On Appeal from the Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, Percy Hight, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ordered and adjudged that the judgment made and entered in the Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed, appellant to recover its costs of appeal.

MEMO

The principal legal question involved in this case is that answered in the case of *Larson* v. *City of Long Beach*, Civ A 8063, being decided today, the circumstance that the plaintiff in this case was a captain of the defendant city's fire department up to his retirement, May 1, 1951, affording no basis of distinction.

The judgment upon which the plaintiff relies was dated July 5, 1949, and was ordered amended August 17, 1949. In the very nature of things this judgment could not adjudicate the effect of the amendment to the city charter which took effect July 5, 1951, and, in any event, it does not purport to do so. We conclude that the effect of the July 5, 1951

amendment was to freeze plaintiff's pension as of that date. We see no reason to say that the amount of pension, which today is less than the rate it would be but for the amendment of July 5, 1951, but next year may be more, is either not substantial or not reasonable in amount. Plaintiff's contract right to a pension has not been impaired.

May 6, 1953.

BISHOP,
Judge.

I concur.

SHAW,
Presiding Judge.

——— ———,
Judge.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the memorandum & original judgment entered by said Court in the above entitled cause on the 6th day of May, 1953, and now remaining of record in this Court.

Witness my hand and seal of the Court, affixed this 6th day of May, 1953.

HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.
By J. MACGREGOR, *Deputy.*

APPENDIX C

IN THE MUNICIPAL COURT OF LONG BEACH, JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 74714

CECELIA S. LARSON, Plaintiff,

vs.

CITY OF LONG BEACH, a municipal corporation, Defendant.

JUDGMENT

The above entitled cause came on regularly for trial in Department 1 of the above entitled court on February 11, 1952, the Honorable Percy Hight, Judge presiding. Plaintiff appeared by her attorney, Kenneth Sperry, and the defendant appeared by the City Attorney, Irving M. Smith, and Deputy City Attorney, Clifford E. Hayes. A trial by jury having been waived and evidence having been introduced, and the cause having been submitted upon the filing of written briefs, and the parties having stipulated in writing as to the correct computation of pension benefits due plaintiff as of March 31, 1952, and the court being fully advised in the premises, ordered the following judgment:

It is adjudged that the plaintiff, Cecelia S. Larson, recover of and from the City of Long Beach, a municipal corporation, the sum of two hundred fifty-six and 62/100 dollars ($256.62), lawful money of the United States, together with her costs of suit herein incurred, taxed in the sum of $19.35.

April 7, 1952.

PERCY HIGHT,
Judge.

I hereby certify this to be a true copy of the Judgment in the above case rendered April 7, 1952.

R. M. BAUCHET,
Clerk.
By A. A. WILLIAMS,
Deputy.

Entered in Minute Book No. 25, page 440, on April 8, 1952, Register D.

APPENDIX D

IN THE MUNICIPAL COURT OF LONG BEACH, JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 75161

RUSSELL T. THOMPSON, Plaintiff,

vs.

CITY OF LONG BEACH, a municipal corporation, Defendant.

JUDGMENT

The above entitled cause came on regularly for trial in Department 1 of the above entitled court on May 5, 1952, the Honorable Percy Hight, Judge presiding. Plaintiff appeared by his attorney, Kenneth Sperry, and the defendant appeared by the City Attorney, Irving M. Smith, and Deputy City Attorney, Clifford E. Hayes. A trial by jury having been waived and evidence having been introduced, and the court being fully advised in the premises, ordered the following judgment:

It is adjudged that the plaintiff, Russell T. Thompson, recover of and from the City of Long Beach, a municipal corporation, the sum of two hundred thirty-five and 44/100 dollars ($235.44), lawful money of the United States, to-

gether with his costs of suit herein incurred, taxed in the sum of $15.20.

I hereby certify this to be a true copy of the Judgment in the above case rendered May 6, 1952, and entered in Minute Book No. 25, Page 523, on May 7, 1952.

R. M. BAUCHET,
Clerk.
By A. A. WILLIAMS,
Deputy.

APPENDIX E

IN THE MUNICIPAL COURT, CITY OF LONG BEACH, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 74714

CECELIA S. LARSON, Plaintiff,

vs.

CITY OF LONG BEACH, a municipal corporation, Defendant.

COMPLAINT FOR MONEY (Unpaid Pension Benefits)

Plaintiff complains of defendant and for cause of action alleges:

I

That the defendant, City of Long Beach, is a municipal corporation, operating under a freeholders' charter.

II

That plaintiff is the widow of Engebret Larson, deceased, who was killed on February 25, 1942, while performing his duties as a police officer for the City of Long Beach; that prior to his death as aforesaid, said Engebret Larson had been a member of the Police Department of the City of Long Beach for approximately eighteen (18) years, and that the rank held by him on the date of his death and for several

years prior thereto was that of Sergeant. That following his death, plaintiff filed an application with the Board of Police and Fire Pension Commissioners of the City of Long Beach for a widow's pension, as provided by the terms of Section 187, Subd. (4), of the Long Beach City Charter. That her said application was at first denied by said Pension Board and that such proceedings were duly had and taken in the Superior Court of the State of California in and for the County of Los Angeles in Action No. LBC-11566, entitled "Cecelia S. Larson, Plaintiff, vs. Board of Police and Fire Pension Commissioners of the City of Long Beach, Robert C. Swanson, George E. Merrill and Frank Garrety, as members thereof, The City of Long Beach, a municipal corporation, H. C. Morse, City Treasurer and Myrtle L. Gunsul, as Auditor of said city, Defendants", that a judgment was duly made and entered therein on September 12, 1944, requiring said defendants to grant plaintiff a pension dating from February 25, 1942. in an amount equal to one-half of the salary attached to the rank held by her deceased husband at the time of his death, to wit, that of Sergeant in the Long Beach Police Department, and further providing that the same be paid throughout the remainder of her life for the term provided by said Section 187, Subd. (4); that following the entry of said judgment, an appeal was taken to the District Court of Appeal, but the same was affirmed by the decision of said court, which is reported at 71 Cal. App. 2d 60, 162 P. 2d 33. That following the affirmance of said judgment, plaintiff was granted a pension in accordance with the terms of said judgment.

III

That under and by virtue of the terms of said judgment and the pension granted pursuant thereto, plaintiff has been and now is entitled to receive from the City of Long Beach a widow's pension in an amount equal to one-half of the salary currently attached to the rank of Sergeant in the Long Beach Police Department. That the salary attached to said rank has varied from time to time and that the defendant City has paid one-half of said amount

to plaintiff up to and including the month of June, 1951. That under and by virtue of the terms of the salary ordinance duly adopted by the City Council of said City, the salary attached to the rank of Sergeant in the Long Beach Police Department was fixed at $371.00 per month as of July 1, 1951, and was duly raised to $400.00 per month, effective as of July 19, 1951; that following the 1st day of July, 1951, there has accrued and become payable to plaintiff on account of said widow's pension the sum of $991.02, which represents one-half of the salary attached to said rank or position up to and including November 30, 1951. That the defendant has failed and refused to pay to plaintiff any sum in excess of $852.50 on account of the pension payments which accrued to her throughout said period and that there is now due, owing and unpaid from defendant to plaintiff the sum of $138.72 on account of said unpaid pension benefits.

IV

That plaintiff has never remarried since the death of her said husband, Engebret Larson, and that she has no other source of income aside from the moneys received by her on account of said pension payments.

V

Upon information and belief, plaintiff alleges that the failure of the defendant City to pay the full amount of pension benefits to which she is entitled as aforesaid is based upon the provisions of Section 187.2 of the City Charter, which purportedly became effective June 5, 1951, and by the terms of which the pension benefits payable to plaintiff became fixed and frozen at the amount being paid to her as a pension on the effective date of said amendment. That said Section 187.2 is unconstitutional and void insofar as the same purports to alter or modify the vested right of plaintiff to receive an amount equal to one-half of the salary currently attached to the rank of Sergeant in the Long Beach Police Department throughout the remainder of her life, so long as she remains unmarried. That plaintiff is wholly dependent upon said pension benefits

for her support and maintenance and that due to the current increase in the cost of living, the moneys being received by her on account of such pension benefits are and will be insufficient to meet her needs unless said payments are permitted to fluctuate in accordance with the salary currently attached to the rank held by her deceased husband, as provided by law at the time said pension was granted. That the purported changes sought to be brought about by the provisions of said Section 187.2 are unreasonable and void insofar as they relate to the obligation upon the part of the defendant to pay said pension benefits to plaintiff, and that the provisions of said Section 187.2 violate the provisions of Art. I, Sections 13 and 16 of the Constitution of the State of California, and of Section 10, Art. I, of the Constitution of the United States, as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations.

WHEREFORE, plaintiff prays judgment against said defendant City of Long Beach, in the sum of $143.59; that she recover her costs of suit herein expended, and for such other and further relief as to the court may seem proper in the premises.

KENNETH SPERRY,
Attorney for Plaintiff.

APPENDIX F

IN THE MUNICIPAL COURT OF LONG BEACH, JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 75161

RUSSELL T. THOMPSON, Plaintiff,

vs.

CITY OF LONG BEACH, a municipal corporation, Defendant.

COMPLAINT FOR MONEY (Unpaid Pension Benefits)

Plaintiff complains of defendant and for cause of action alleges:

I

That the defendant, City of Long Beach, is a municipal corporation, operating under a freeholders' charter.

II

That heretofore and to wit, on the 16th day of November, 1929, plaintiff was duly employed and appointed to a position in the Fire Department of the City of Long Beach, and that he continued as a member of said Fire Department up to May 1, 1951, at which time he was granted a retirement pension pursuant to the provisions of Section 187, subd. (2), of the Long Beach City Charter, as originally adopted in the year 1925 (Stats. 1925, p. 1333).

III

That in accepting and continuing in said employment with the City of Long Beach as aforesaid, plaintiff relied upon the provisions of said Section 187 of the City Charter of said City and the various benefits therein provided, including the right to earn and receive a retirement pension upon the completion of 20 or more years of service, as provided by Subd. (2) of said Section 187. That during the past

15 years, numerous opportunities of engaging in other employment, which would have paid a higher current rate of compensation than that actually being received by plaintiff from the City of Long Beach, were offered to plaintiff but that in reliance upon the belief that he was earning the right to receive the various benefits specifically provided by said Section 187, plaintiff continued to serve in the Fire Department of the City of Long Beach and refrained from accepting said higher paying employment opportunities.

IV

That said Section 187 was expressly repealed by the provisions of Section 187.1 of the City Charter, which became effective March 29, 1945, (Stats. 1945, p. 2954). That following the adoption of said Section 187.1, and to wit, under date of August 19, 1946, plaintiff, together with numerous other persons similarly situated, filed a complaint for declaratory relief in the Superior Court of the State of California in and for the County of Los Angeles, wherein the defendant, City of Long Beach, a municipal corporation, was made a defendant, together with certain other officials of the City of Long Beach, which said action was numbered LBC-14131. That the City appeared and filed an answer and cross-complaint in said action, in which it asserted numerous contentions, including the contention that although said Section 187.1 was not effective so as to prevent the plaintiffs therein from earning and receiving a retirement pension equal to 50% of the salary attached to the rank held by each for more than one year prior to retirement, such pension right was subject to being modified and reduced by future charter amendments. That such proceedings were duly had and taken in said action that a final decision and judgment was duly made and entered therein which finally adjudicated and declared the respective rights and obligations of plaintiff and the City of Long Beach in connection with said Section 187 and the purported repeal thereof by the terms of said Section 187.1. That by the terms of said declaratory judgment as amended by the decision of the District Court of Appeal of the State of California, reported at 101 Cal.

App. 2d 15, 224 P. 2d 792, it was finally determined and adjudicated that plaintiff's right to earn and receive the various pension benefits provided by subdivisions (2), (3) and (4) of said Section 187 are and were contractual in nature and hence within the protection of the provisions of Article I, Sections 13 and 16, of the Constitution of the State of California, and of Section 10, Article I, of the Constitution of the United States, and that the repeal of said Section 187 of the Long Beach City Charter by the terms of Section 187.1 had no binding force and effect upon plaintiff's right to earn and receive the pension benefits provided by Subdivision (2) of said Section 187, with the single exception that plaintiff could not earn a retirement pension in excess of 50% of the salary attached to the rank held by plaintiff for one year prior to the date of his retirement. That a true copy of said declaratory judgment as amended by said decision of the District Court of Appeal is annexed hereto as Exhibit "A" and made a part hereof by express reference. That by the terms of said final decision and judgment it was likewise finally determined and adjudicated that the City's contention concerning the right of the electorate to further modify or reduce said pension rights was invalid.

V

That pursuant to said declaratory judgment, plaintiff was granted a retirement pension dating from May 1, 1951, in an amount equal to one-half of the salary attached to the rank of Captain in the Long Beach Fire Department, which was the rank held by plaintiff for more than one year prior to the date of his retirement.

VI

That the salary attached to said rank has varied from time to time and that the defendant City has paid one-half of said amount to plaintiff up to and including the month of June, 1951. That under and by virtue of the terms of the salary ordinance duly adopted by the City Council of the City of Long Beach, the salary attached to the rank of Captain in the Long Beach Fire Department was raised

from $341.00 per month to $371.00 per month as of July 1, 1951, and was duly raised to $425.00 per month effective as of July 19, 1951. That following the 1st day of July, 1951, there has accrued and become payable to plaintiff on account of said retirement pension the sum of $1,258.44, which represents one-half of the salary currently attached to the rank or position of Captain in the Fire Department up to and including December 31, 1951. That defendant has failed and refused to pay to plaintiff any sum in excess of $1,023.00 on account of the pension payments which accrued to him throughout said period, and that there is now due, owing and unpaid from defendant to plaintiff the sum of $235.44 on account of said unpaid pension payments.

VII

Upon information and belief plaintiff alleges that the failure of the defendant City to pay the full amount of pension benefits to which he is entitled as aforesaid is based upon the provisions of Section 187.2 of the City Charter, which purportedly became effective July 5, 1951, and by the terms of which the pension benefits payable to plaintiff became fixed and frozen at the amount being paid to him as a pension on the effective date of said amendment. That said Section 187.2 is unconstitutional and void insofar as it purports to alter or modify the vested right of plaintiff to receive a retirement pension in an amount equal to one-half of the salary currently attached to the rank of Captain in the Long Beach Fire Department throughout the remainder of his life, and as determined by said declaratory judgment. That the purported changes sought to be brought about by the provisions of said Section 187.2 are unreasonable and void insofar as they relate to the obligation upon the part of the City to pay said pension benefits to plaintiff, as determined by said final judgment of the Superior Court in said declaratory relief proceedings, and that the provisions of said Section 187.2 are in contravention of the provisions of Article I, Secs. 13 and 16 of the Constitution of the State of California, and Section 10, Article I of the Constitution of the United States as well as the Fourteenth Amendment

to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligation.

WHEREFORE, plaintiff prays judgment against said defendant, City of Long Beach, in the sum of $235.44; that he recover his costs of suit herein expended, and for such other and further relief as to the Court may seem proper in the premises.

KENNETH SPERRY,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Russell T. Thompson being by me first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

RUSSELL T. THOMPSON,

Subscribed and sworn to before me this 21st day of January, 1952.

KENNETH SPERRY,
Notary Public
in and for said County and State.

[SEAL.]

EXHIBIT "A"—APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. LB C-14131

JUDGMENT IN DECLARATORY RELIEF

ALBION R. ALLEN, MERLE W. ANDERSON, CHARLES M. ARCHIBALD, RAYMOND E. ARRITT, WILBUR F. ARRITT, EDWARD D. BALLARD, A. H. BEVIN, ARNOLD E. BOE, H. W. BOGGESS, ELIJAH E. BROWN, JAMES M. BRIDGES, MILES R. BROWN, HENRY T. BRUMMETT, LYNN H. BULLEN, DAVID F. BURDETTE, RAYMOND J. CAMPBELL, JESSE P. CARLL, BURTON CLARENCE CARSTENSEN, JOHN F. CLAUSSON, RICHARD R. CLEMENTS, J. O. CLEMONS, ROBERT E. COCKE, EARL W. CRONKITE, WALTER B. CULBERSON, IRA D. DOYAL, AVERY B. DOYLE, CLYDE J. DOYAL, JOHN E. DUNBAR, ADOLPH F. FISCHER, GENE F. FISHER, FRANK S. FORKER, LOUIS L. FRANCIS, HARMON B. GEARHART, LEWIS M. GIBBS, F. M. GRAHAM, MERLE T. GUTHRIE, OSCAR L. GUTHRIE, HUBERT J. HAGENS, M. C. HALFORD, EUGNE HAWES, M. L. HARMAN, FRED H. HEAD, LEROY C. HEAD, WILLIAM L. HEAD, A. M. HENEISE, WILLIAM F. HENDERSON, BURT L. HOLLOWAY, MAGNUS C. JENSEN, OSCAR H. JESSING, A. A. JONES, JAMES L. KENNEDY, FORREST W. KNEISEL, WALTER D. KOLB, WILLIAM E. KUMMER, LEROY C. LAKE, ROBERT H. LEWIS, F. BURR LINTHACUM, JOHN J. LLOYD, JOHN J. LOGAN, HOWARD H. LOSH, HAROLD E. MAAS, THEODORE R. MARKHAM, LORIN Q. MARTIN, KENNETH L. MILLER, CLINTON R. MECKLEY, WALTER M. MORTON, ROBERT B. MOORE, MARK H. MOORE, ALBERT R. MUIS, ALBERT S. MURPHY, HAROLD B. MCDONALD, GEORGE A. MCDONELL, W. M. MCGREE, J. P. MCGREE, CHAS. A. MCLAUGHLIN, E. O. OBERG, FRANCIS L. OBERT, CULLEN A. ODETTE, F. J. OSTROSKI, HENRY PENNER, CHARLES PANTER, ERIC K. PETERSON, JOHN W. PUGH, LOUIS F. RAFAEL, HENRY H. REDDING, J. WM. REED, ERNEST L. RICHARDS, FRANK S. SANDEMAN, O. U. SLATON, WINFORD E. SLAUGHTER, ALVIN F. SLAIGHT, FLOYD O. SMITH, B. R. SMITS, JOHN L. SOLLEY, EMMETT

O. STANTON, GEO. J. STANSON, JOHN P. STEWART, JAMES N. STRATTON, MILO B. TAYLOR, STREVELL G. TAYLOR, HAROLD C. THORNTON, RUSSELL T. THOMPSON, WM. TOMBS, S. W. TUBBS, WM. J. B. TURNER, DON C. TYLER, ARTHUR F. VALENZUELA, ELMER W. VANCE, ARTHUR H. WIGNEY, SR., HOWARD M. WIGHT, G. M. WILHITE, HARRY A. CLAYTON, GEORGE C. LYON, R. L. SHELDON, J. R. WILLIAMS, ROY E. JENNINGS, FRANK W. ELLSWORTH, and C. A. WIGGINS, L. M. DREIS, THEODORE SCHNEIDER, MAURICE M. CLEMENT, *Plaintiffs*,

vs.

CITY OF LONG BEACH, a Municipal Corporation; A. L. PARMLEY, JOSEPH R. RAMSEY, RAYMOND C. KELLER, GEORGE D. EZELL, CLARENCE E. WAGNER, LAWRENCE O. JACKSON, HERBERT R. KLOCKSIEM, BURTON W. CHACE and BAZIL U. CARLESON, as Members of the CITY COUNCIL of Said City, MYRTLE L. GUNSUL, City Auditor, HERBERT C. MORSE, City Treasurer, and H. P. BECKMAN, City Accountant, *Defendants*

Judgment Amended by Order of Court dated 8-17-49.
Attest: 8-23-49. Harold J. Ostly, County Clerk, by C. Escapite, Deputy.

The above entitled cause came on regularly for trial in Department Long Beach "C" of the above entitled court on the 20th day of January, 1949, the Honorable Otto J. Emme, Judge presiding. Plaintiffs appeared by their attorneys, Joseph A. Ball and Kenneth Sperry, and the defendants appeared by their attorneys, Irving M. Smith, City Attorney, Nowland M. Reid, Assistant City Attorney, and Clifford E. Hayes, Deputy City Attorney, and evidence, both oral and documentary having been presented and the parties having stipulated to certain facts, and the cause having been submitted for decision upon written briefs, and the Court having made and filed herein its decision in writing wherein the facts found and conclusions of law are separately stated;

Now, therefore, by virtue of the law in the premises and pursuant to the findings aforesaid,

It is ordered, adjudged and decreed that the repeal of Section 187 of the Long Beach City Charter by the terms of Section 187.1 thereof has no binding force or effect upon the respective rights of any of the plaintiffs above named to earn and receive the various pension benefits provided by Section 187 of said City Charter and that their respective rights to earn and receive the various benefits provided by Subdivisions (2), (3) and (4) of said Section 187 are and were contractual in nature and hence within the protection of the provisions of Article I, Sections 13 and 16 of the Constitution of the State of California and of Section 10 of Article I of the Constitution of the United States as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations, provided, however, that said contractual rights are limited, with respect to a retirement pension, to an annual pension equal to one-half of the salary attached to the rank held by such plaintiff or plaintiffs one year prior to the date of their respective retirements, and no more.

It is further ordered, adjudged and decreed that plaintiffs and each of them are entitled to receive the disability pension benefits provided by Section 187, Subdivision (3), of the City Charter upon the happening of any of the contingencies therein provided and that the City Council is under a legal duty to order the retirement of such plaintiffs from active service on the Department upon the same contingencies and under the same conditions and for the same term as provided by said Section prior to its purported repeal and that during such retirement, any plaintiff so retired shall be entitled to be paid from the City Treasury of the City of Long Beach a yearly pension equal to one-half of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order, which said pension is payable in equal monthly installments for the term provided by Section 187, Subdivision (3) of the City Charter prior to its purported repeal.

It is further ordered, adjudged and decreed that the widows, children and dependent parents of plaintiffs and

each of them are entitled to receive the pension benefits provided by Subdivision (4) of said Section 187, upon the same contingencies and under the same terms and conditions as therein provided prior to its purported repeal by said Section 187.1, and that the City Council is under a legal duty to grant such pension benefits upon the same contingencies and under the same terms and conditions as before the enactment of said Section 187.1.

It is further ordered, adjudged and decreed that none of the contentions advanced by defendants in their answer or cross-complaint herein is valid and that from and after the effective date of Section 187.1, to wit, March 29, 1945, the defendant City Auditor is not authorized or required to make any deductions from the salaries of any of the plaintiffs as previously required by Subdivision (6) of Section 187.

It is further ordered and adjudged that the plaintiffs recover of and from the defendant, City of Long Beach, a municipal corporation, their costs of suit herein expended, taxed in the sum of $26.75.

Dated: July 5, 1949.

OTTO J. EMME,
Judge of the Superior Court.

APPENDIX G

SECTION 187.2 OF THE LONG BEACH CITY CHARTER, ADOPTED IN 1951

Sec. 187.2(a) The amount to be paid as a pension to each person granted a pension prior to the effective date of this amendment, pursuant to rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, is hereby fixed in each instance at the amount paid to each such person by the City on the effective date of this amendment and thereafter said pension shall be paid monthly in said fixed amount; provided, however, that the amount to be paid as a pension to any person who shall be entitled to

such pension under the provisions of said Section 187 prior to said repeal thereof, by reason of the death of a person heretofore granted such a pension, is hereby fixed in each instance at an amount equal to fifty per cent (50%) of the salary attached to the rank or position upon which the pension of said deceased person is fixed on the effective date of this amendment.

(b) The amount to be paid as a pension to each person who shall be granted a pension subsequent to the effective date of this amendment pursuant to the rights thereto vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, shall be based in each instance upon the applicable percentage of the average monthly salary earned during the five (5) years immediately preceding the retirement or death of the person whose service formed the basis for such right to a pension. Such average monthly salary shall be determined by dividing the total salary earned by such person during said five-year period by the number of months during which such person earned such salary.

(c) There is hereby created a fund to be known as the "Police and Fire Pension Fund," for the purpose of meeting the payment of pensions, the right to which pensions became vested by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof. Said fund shall be a continuing fund and shall not be subject to transfer at the close of the fiscal year. The City Council may, from time to time, appropriate or transfer money to said fund. All deductions from the salaries of certain members of the Police and Fire Departments required to be made by this section shall be placed in said fund. The money in said fund shall be used only for the payment of such pensions as are referred to in this section, or the payment, with interest, of amounts deducted from salaries of members of said departments, as herein provided. Pending such use, however, the money in said fund, to the extent and manner authorized by the City Council, may be invested in such securities as are authorized by law for the investment of public funds. Any interest

or increment received because of such investment shall be paid into and become a part of said fund.

(d) Ten per cent (10%) of the salary of each person, who is a member of the Police or Fire Department on the effective date of this section and who has certain vested rights by reason of the provisions of Section 187 of this Charter prior to the repeal thereof by the adoption of Section 187.1 hereof, shall be deducted from such salary and paid semi-monthly into the "Police and Fire Pension Fund," until such member has completed the number of years of service required for his eligibility for retirement. An amount equal to all amounts so deducted shall be paid to such person upon his ceasing to be a member of either of said departments by reason of resignation or discharge prior to such person's having completed the number of years of service required for his eligibility for retirement. No member absent by reason of ordered military service shall be paid the amount of his deductions. Upon reinstatement from such service, such member shall pay to the City, for deposit in said fund, the amount of money that would have been deducted from his salary were he not so absent. Such payment shall be made in the manner prescribed by the City Council. In the event any person, from whose salary deductions have been made pursuant to this section, dies before retirement, such amounts shall be paid to his estate or designated beneficiary; provided, however, no payment whatever shall be made in the event any person shall be eligible to be granted a pension by reason of such death. There shall be added to the total amount payable by the City, representing said deductions, at the time of payment thereof, accrued interest thereon, compounded annually, at the rate of two and one-half per cent (2½%) per annum.

(e) If any subsection sentence, clause or phrase of this Section 187.2 proves to be invalid or unconstitutional, such shall not impair the validity or constitutionality of any other subsection, sentence, clause or phrase of this section is dependent for its operation upon the subsection, sentence, clause or phrase so held invalid or unconstitutional; it is hereby declared that the provisions of this section are severable and that the same, and each and every subsection,

sentence, clause and phrase thereof, would have been ratified and approved irrespective of the fact that any one or more other subsections, sentences, clauses or phrases thereof are held to be invalid or unconstitutional.

(California Statutes 1925, p. 1333)

APPENDIX H

PERTINENT PROVISIONS OF SECTION 187 OF THE LONG BEACH CITY CHARTER AS ORIGINALLY ADOPTED APRIL 18, 1925:

Sec. 187 * * * (2) Any member of the Fire or Police Department, who shall have served in such department for thirty years in the aggregate in any capacity or rank whatever, shall, on his application to the commission, or by order of the commission, if it be deemed for the good of the department, be retired from further service in such department, and he shall thereafter, during his lifetime, be paid in equal monthly installments from said fund a yearly pension equal to two-thirds of the annual salary attached to the rank or position held by him in such department one year prior to the date of his retirement. Provided, that after twenty years' aggregate service, on application of such member, or by the commission for the good of the department, such person shall be retired and paid in equal monthly installments from said fund a limited pension as follows: For twenty years' service, fifty per cent (50%) of the annual salary of the rank or position held by him one year prior to the date of retirement; and an additional one and two-thirds per cent (1⅔%) of such salary for each year over twenty years and less than thirty years in the aggregate served by such member before retirement.

* * * (4) Whenever any member of the Police or Fire Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department, then an annual

pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents, in an amount equal to one-half (½) of the salary attached to the rank or position which such deceased person held in such department at the time of his death or one year prior to the date of his retirement from active duty in such department. Said pension shall be paid to the widow during her lifetime, and thereafter to any child or children surviving her, or to his child or children should there be no widow, until such child or children shall have attained the age of eighteen years, or to his dependent parent or parents during their lifetime or during such dependency, should there be no widow or child. Provided, however, that no widow of a pensioner shall be entitled to a pension unless she shall have been married to such deceased pensioner at least one year prior to the date of his death; and provided, further, that if such widow, child or children shall marry, then the pension paid to the person so marrying shall cease; and provided further, that should the dependency of such parent or parents terminate, then the pension paid to such dependent parent or parents shall cease.

(5) For the purpose of the provisions contained herein the Police Department shall consist of all members of such Police Department appointed under civil service rules and regulations and sworn in, as provided by the provisions of the Charter of the City of Long Beach, and including such members of such department as are not required to be under civil service rules and regulations, to perform the duties of a regular police officer of the city of Long Beach under whatever designation they may be described in any salary or departmental ordinance providing compensation for the members of said Police Department; and the Fire Department shall consist of all persons duly and regularly appointed in the Fire Department under civil service rules and regulations (as provided by the provisions of the Charter of the city of Long Beach, and including such members of such department as are not required to be under Civil Service rules and regulations), whose duty it is to prevent and extinguish fires in the city of Long Beach, under whatever

designation they may be described in any salary or departmental ordinance providing compensation for said Fire Department.

• • •

(California Statutes, 1951, p. 4635.)

APPENDIX I

SECTION 187.1 OF THE LONG BEACH CITY CHARTER, FILED WITH THE SECRETARY OF STATE JANUARY 27, 1945, AND EFFECTIVE MARCH 29, 1945.

Sec. 187.1. Sections 187 and 188 of this Charter are hereby repealed; provided, however, that any member of the Fire or Police Department who shall have served in such department for twenty (20) years or more on the effective date of this amendment shall be entitled to retire at any time within five (5) years from said effective date as provided by subdivision (2) of said Section 187, and, beginning with the date of his retirement, shall be paid a pension of such percentage of his salary as he would have been entitled to receive had he been retired on the effective date of this amendment. This amendment shall take effect sixty 60) days after its approval by the Legislature of the State of California.

(California Statutes, 1945, p. 2954.)

LE COPY

Office - Supreme Court, U.S.
FILED
SEP 29 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON AND RUSSELL T. THOMPSON,
Appellants,

vs.

CITY OF LONG BEACH

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IRVING M. SMITH,
City Attorney;
CLIFFORD E. HAYES,
Deputy City Attorney,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON AND RUSSELL T. THOMPSON,
Appellants,

vs.

CITY OF LONG BEACH

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee in the above entitled cause for its statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The questions sought to be presented on this attempted appeal are whether (1) the pension rights of the appellants

may be amended by appropriate legislative action after appellants have been granted pensions pursuant to charter provisions, said modification providing for the payment of a fixed pension in the amount paid on the effective date of the amendment, instead of a pension based upon the fluctuating pay of the employees of the Police and Fire Departments; (2) the modification of the pension rights is unreasonable and therefore void; and (3) a judgment in declaratory relief construing the effect of a prior amendment to the pension system is res judicata and prohibits the adoption of a subsequent charter amendment by appropriate legislative action.

The provisions of 187.2 of the Long Beach City Charter, approved in 1951 (California Statutes 1951, p. 4634); the pertinent provisions of Section 187 of the Long Beach City Charter, approved in 1925 (California Statutes 1925, p. 1333); and Section 187.1 of the Long Beach City Charter, approved in 1945 (California Statutes 1945, p. 2954) are attached to appellants' jurisdictional statement as Appendix Nos. G, H and I, respectively.

In 1925 the electorate of the City of Long Beach approved an amendment to the Charter of the City of Long Beach, designated as Section 187. Said section created a pension system in favor of certain employees in the Police and Fire Departments of the City.

In 1931 the electorate approved an amendment to Section 187. Said amendment is not involved in this action.

In 1945 the electorate of the City approved Section 187.1 of the Charter, which section repealed Section 187. The Supreme Court of California in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, held that the City of Long Beach could not deprive the employees of the Police and Fire Departments of all pension rights. At page 852 the court states: "The right to a pension becomes vested upon

the acceptance of employment." The Supreme Court in discussing the nature of pension rights, in the *Kern* case, stated as follows, beginning at page 854:

> "In the leading case of *Pennie* v. *Reis* (1889), 80 Cal. 266 [22 P. 176] (affirmed in 132 U.S. 464 [10 S. Ct. 149, 33 L. Ed. 426]), a death benefit payable to legal representatives was eliminated by the implied repeal of a pension statute, but the repealing statute substituted a more comprehensive pension system which included a death benefit payable to certain dependents. The practical result was a modification which gave the employees more pension benefits than they had before. This case therefore does not stand for the proposition than an employee may be deprived of all pension rights. *Clarke* v. *Reis*, 87 Cal. 543 [25 P. 759], and *Clarke* v. *Police etc. Ins. Board*, 123 Cal. 24 [55 P. 576], were based on the same statute and are distinguishable on the same grounds. (Cf. *Cohrn* v. *Henderson* (1912), 19 Cal. App. 89 [124 P. 1037]; *Burke* v. *Board of Trustees* (1906), 4 Cal. App. 235 [87 P. 421].)
>
> "The kind of modification that has been upheld is illustrated by *Brophy* v. *Employees Retirement System*, 71 Cal. App. 2d 455 [162 P. 2d 939], where the court sustained an amendment, made before the time for retirement, reducing the monthly amount to be paid to retired employees engaged in gainful occupations. It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence. (*Brooks* v. *Pension Board*, 30 Cal. App. 2d 118 [85 P. 2d 956]; *Sweesy* v. *Los Angeles etc. Retirement Bd.*, 17 Cal. 2d 356 [110 P. 2d 37]; *Home* v. *Souden*, 199 Cal. 508 [250 P. 162]; *Casserly* v. *City of Oakland*, 6 Cal. 2d 64 [56 P. 2d 237]; *Brophy* v. *Employees Retirement System*, 71 Cal. App. 2d 455 [162 P. 2d 939]; *McCarthy* v. *City of Oakland*, 60 Cal. App. 2d 546, 550

[141 P. 2d 4]; *Vero* v. *Sacramento City E. R. System*, 41 Cal. App. 2d 482, 486 [107 P. 2d 82].)

"The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.

"Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

After the decision of the Supreme Court in the case of *Kern* v. *City of Long Beach*, the appellant Thompson, together with other employees of the Police and Fire Departments, filed an action in the Superior Court of the State of California, entitled *Allen* v. *City of Long Beach*, LBC-14131, (a copy of the judgment entered in said action is attached to appellants' jurisdictional statement, Exhibit "A"—Appendix F). In this case, the appellant Thompson, and the other plaintiffs named therein, sought a declaratory judgment, declaring their rights under Section 187 of the Charter, and contended that Section 187.1, which section repealed Section 187, did not in any manner affect their rights under Section 187 of the Charter. However, the

District Court of Appeal of the State of California, (*Allen* v. *City of Long Beach; Adams* v. *City of Long Beach*, 101 Cal. App. 2d 15) held that the rights of the plaintiffs in said action were affected by Section 187.1 of the Charter and that the right of the plaintiffs to earn a pension in excess of fifty per cent (50%) of their salary by reason of longer service was repealed. The District Court of Appeal in discussing the nature of pension rights stated:

> "We therefore adopt as part of this opinion the following language from the Palaske case [p. 132]:
>
> 'Applying the principles set forth in *Kern* v. *City of Long Beach*, supra, it appears that it was within the power of the city to modify its pension plan to provide that on and after the effective date of the amendment an employee who was entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an employee he could not thereby earn any additional pension above that to which he was entitled on the effective date of the amendment. As stated by the Supreme Court, the employee has a vested right only to a substantial or reasonable pension. His contractual right to such a pension has not been impaired by legislation which, operating prospectively, merely withdraws any right or option to earn a bonus by continuing in employment after he has become eligible for retirement.'" *Palaske* v. *City of Long Beach*, 93 Cal. App. 2d 120 [208 P. 2d 764].

Following a decision of the District Court of Appeal, the plaintiffs therein filed a petition for hearing in the Supreme Court of the State of California, which petition for hearing was denied. *Subsequently, the plaintiffs in said case perfected their appeal to this Honorable Court, contending that a statute modifying their pension rights violated the provisions of the Constitution of the State of California and the Constitution of the United States of America.*

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This Honorable Court granted the motion of the appellees therein to dismiss the appeal and affirmed the judgment.

In 1951 the electorate of the City of Long Beach approved Section 187.2 of the Charter. Under the provisions of the charter amendment, the pension payable to appellants became fixed at the amount paid to each appellant on the effective date of the amendment. Prior to the adoption of Section 187.2, each of the appellants was paid a pension based upon the fluctuating pay attached to a certain rank in the Police or Fire Department. After the effective date of Section 187.2 of the Charter (June 5, 1951) and in July and August of 1951, the City raised the pay of the employees of the Police and Fire Departments. The appellants filed these actions against the City of Long Beach, in the Municipal Court of the City of Long Beach, to recover the difference between the amount actually paid to plaintiffs and the amount which would have been paid to them had their pension been based upon the fluctuating pay of employees of the Police and Fire Departments. The trial court rendered judgments in favor of the appellants. The appellee filed appeals with the Appellate Department of the Superior Court and said court reversed the judgments of the trial court.

The appellants contend that pension rights may not be modified in any respect after a pension has been granted. The appellee contends that under California law the right of appellants is to receive a reasonable and substantial pension, and that the right is reserved to the legislative body, that is, the electorate of the City of Long Beach, to make reasonable modifications from time to time, and that there is no impairment of the contract so long as the modification is reasonable and a substantial pension is paid to each of the appellants. The appellee also contends that the pension payable to the appellants under the modification is

reasonable and the pension substantial, and that a prior judgment in declaratory relief, fixing and determining the rights of the parties under a prior charter amendment, does not prevent the electorate of the City from adopting a subsequent amendment.

II

No Substantial Federal Questions Are Presented by the Attempted Appeal

The appellee submits that no substantial questions have been raised on this appeal. The position of the appellants is that any substantial modification of their pension rights is a violation of the provisions of the Constitution of the United States. *The Supreme Court of California has held that an employee only receives a vested right to a reasonable and substantial pension.* Numerous decisions have upheld the power of the legislative body to make reasonable modifications and that said modifications do not impair vested rights. If the contract existing between the City and the employee provides for a reasonable and substantial pension, then it is a legislative function to determine the amount thereof and the courts will only interfere when the modification is unreasonable.

Appellants contend that the Supreme Court of California has never specifically held that the rights of a pensioner may be modified after retirement. However, the Supreme Court in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, at page 854, stated:

> "It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, *and modifications have been approved in some cases when made after the happening of the contingency upon which the payments were to commence.*" (Emphasis added.)

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Thus, the Supreme Court of California recognized the rule that pension payments may be modified after retirement without impairing constitutional provisions.

The general rule throughout the United States is that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance in which the employee has no vested right in its continuance, and that such a pension is terminable at the will of the public authority.

This court, in the case of *Frisbie* v. *United States*, 39 L. Ed. 657 (157 U.S. 160), stated at page 659:

> "The pension granted by the government is a matter of bounty. *'No pensioner has a vested legal right to his pension.* Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton*, 60 U.S. 19 How. 355 (15:658); *United States* v. *Teller*, 107 U.S. 64, 68 (27:352, 354)." (Emphasis added.)

54 A.L.R. 943;
98 A.L.R. 505;
112 A.L.R. 1009;
137 A.L.R. 249.

The Supreme Court of California has declared that the vested contractual obligation created by the Charter in favor of the employees of the Police and Fire Departments of the City of Long Beach is to receive a reasonable and substantial pension with the right reserved in the legislative body to make reasonable alterations and modifications. The contract is not altered by reason of the fact that the employee is not required to perform further services. The contract remains unchanged unless altered by appropriate legislation. The Supreme Court of the State of California recognized this principle when it stated:

> "Insofar as the *time* of vesting is concerned, there is little reason to make a distinction between the periods

before and after the pension payments are due." *Kern* v. *City of Long Beach*, 29 Cal. 2d 848.

If no distinction is to be made as to the time of vesting of the employee's rights, then it follows that the power remaining in the legislative body to make reasonable changes and modifications remains a part of the contract after retirement. The courts have never held that a right may become *more vested* by the retirement of the employee.

The appellants refer to the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, and argue that the statement concerning reasonable modification was "constructive dictum." The appellee submits that the Supreme Court of California was reviewing and announcing the existing law in California on pensions. The Supreme Court quoted the "constructive dictum" with approval in the case of *Packer* v. *Board of Retirement*, 35 Cal. 2d 212. In the case of *Allen* v. *City of Long Beach*, 101 Cal. App. 2d 15, at page 20, the court answered the criticism of the language in the *Kern* case in the following manner:

> "Respondents have also suggested that the language in the Kern case relating to reasonable modifications was 'by way of dictum.' Whether this be correct or not, the language was expressly approved by the Supreme Court in the later case of *Packer* v. *Board of Retirement*, 35 Cal. 2d 212."

In the recent case of *Wallace* v. *City of Fresno*, 117 A. C. A. 929, the District Court of Appeal stated at page 931:

> "A pension law may be changed or modified and when one is placed upon the pension roll he does not obtain a vested right to any fixed or definite benefits, but only to a substantial or reasonable pension. He has a vested right to a pension, but the amount, terms

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and conditions of the benefits may be altered. (*Kern* v. *City of Long Beach*, 29 Cal. 2d 848 [179 P. 2d 799].)

The appellee submits that the question involved in this appeal is the nature of the contract existing between the appellants and the appellee. The Appellate Department of the Superior Court, in its Memorandum Opinion in the *Larson* case, construed the force and effect of the decisions of the Supreme Court of California and District Court of Appeal, and held that under California law the only vested right granted to the pensioner is to receive a reasonable and substantial pension. The court stated:

* * * * * * *

"There are three pertinent decisions since the *Kern case: Packer* v. *Board of Retirement* (1950), 35 Cal. 2d 212, 217 P. 2d 660; *Palaske* v. *City of Long Beach* (1949), 93 Cal. App. 2d 120, 208 P. 2d 764; *Allen* v. *City of Long Beach* (1950), 101 Cal. App. 2d 15, 224 P. 2d 792. After reading the opinions in these four cases we have no hesitancy in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner, so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension."

If the contract existing between the appellants and the appellee in effect provides for a reasonable and substantial pension and the court has so held, there can be no violation of constitutional provisions if the legislative body acts within the scope of the contract and makes provision for a reasonable and substantial pension.

The courts in several other states which followed the minority rule, which rule is to the effect that employees

receive a vested right of which they cannot be entirely deprived, have held that pension rights may be modified after retirement by appropriate legislative action.

In the case of *State ex rel. Holton* v. *City of Tampa*, 159 So. 292, the plaintiff was a retired member of the Fire Department of the City of Tampa. The City reduced the amount of pension payable and the plaintiff sued. The court, in holding that the plaintiff was not entitled to recover, stated at page 293:

> "But except in a case admitting of no other construction, a statutory retirement provision will not be construed as a contractual limitation binding on the *legislative prerogative to fix the amount* of retirement pay from time to time, so long as entire deprivation is not thereby attempted under the guise of regulation of the amount of compensation."

In the case of *City of Dallas* v. *Trammell*, 101 S. W. 2d 1009, the City of Dallas reduced the amount of pension payable to the plaintiff, a retired member of the Police Department. While the court held that the right to a pension was not a gratuity and that the pension system was a part of the contract of employment, yet the court held that the City had the right to decrease the amount of pension payable. The court at page 1017 stated as follows:

> ". . . The Legislature and the City of Dallas have manifestly sought to do no more than to meet the exigencies and necessities of the situation, and to readjust the basis of the monthly installments payable on pensions to the end that the pension fund itself may be preserved, and that each and all entitled to receive benefits from same shall share upon an equitable basis. In our opinion, the power of the Legislature and of the City of Dallas to accomplish this is certain."

This court has recognized the right of the legislative body to modify pension or annuity systems. In the case of *Dodge*

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v. *Board of Education*, 302 U. S. 74, 82 L. Ed. 57, this court had under consideration a statute of the State of Illinois which reduced the amount of pension payable to retired teachers of the City of Chicago. This court upheld the right of the State of Illinois to amend the pension system.

In the case of *Board of Trustees* v. *People*, 203 P. 2d 490, the Supreme Court of Colorado, after reviewing numerous cases, stated as follows at page 493:

> "From the principle laid down in the foregoing authorities it follows that a legislative change in the amount of the pension is not an impairment of the obligation of the contracts in violation of article II, section 11, of the Colorado Constitution."

In the case of *Talbott* v. *Independent School Dist. of Des Moines*, 299 N. W. 556, is found an extensive analysis of pension cases, and on page 563 the court stated:

> "But the fact that these retirement or disability payments are not gratuities, is not, in our judgment, sufficient to give to them the character of a property, or a vested right, or a contract right, which can not be adversely affected by subsequent legislation by either the state or a municipality . . ."
>
> *Brown* v. *City of Highland Park*, 30 N. W. 2d 798;
> *Payne* v. *Board of Trustees*, 35 N. W. 2d 553;
> *Mac Leod* v. *Fernandez*, 101 Fed. 2d 20;
> *People ex rel Malone* v. *Mueller*, 66 N. E. 2d 516.

The law is well established by this Honorable Court to the effect that this court must accept the decision of the highest court of the state, fixing the meaning of state legislation. The appellee submits that the meaning of Section 187 of the Charter has been established by the courts of the State of California and that the contract existing between the appellants and appellee only provides for a reasonable and substantial pension. Therefore, if the electorate of the

appellee City change the manner of determining the amount of pension payable to the appellants, there is no violation of constitutional provisions.

In the case of *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court stated at page 32 as follows:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; Green v. Neal, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion."

In the case of *Guarantee Trust Co.* v. *Blodgett* 287 U. S. 509, this court stated at page 512 as follows:

> "We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find."

And again, at page 513, this court stated:

> "Since the court below construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

In the case of *Burgess* v. *Seligman*, 107 U. S. 20, this court stated, beginning at page 33:

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are

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established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

In the case of *Phelps* v. *Board of Education*, 300 U. S. 319, the position of the appellants was that by virtue of the act at issue, three years of service under contract confer upon an employee a contractual status, indefinite in duration, which the Legislature is powerless to alter.

The State Court held that whereas the statute was in one sense "perhaps contractual," it was in essence dependent on a statute which the Legislature at will might abolish, or whose emoluments it might change. This court, in affirming the decision of the State Court, stated, beginning at page 322:

"This court is not bound by the decision of a state court as to the existence and terms of a contract, the

obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them."

III

The Amendment Provides for a Reasonable and Substantial Pension

In the *Larson* case, the appellants alleged that the pay attached to the rank of sergeant on June 5, 1951, was $371.00. Fifty per cent (50%) of said sum is $185.50. The appellee submits that the sum of $185.50 per month is a reasonable and substantial pension. It is approximately $100.00 more per month than paid under social security. There was no contract on the part of the appellee to provide appellant with her needs. She may have sufficient income to provide for her livelihood without resorting to pension funds, and, yet, she would be entitled to receive pension payments from the City of Long Beach. There was absolutely no evidence upon which the court could base a finding that the sum of $185.50 per month was not a reasonable and substantial pension.

IV

The Judgment in a Prior Declaratory Relief Action Is Not Res Judicata

The appellant Thompson contends that the judgment rendered in Case No. LBC-14131 is res judicata and fully determines the pension status between the appellant

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Thompson and the appellee, and that the electorate of the City of Long Beach was without power to adopt a charter provision amending the contract as defined by the court in said action. The appellee submits that the question as to whether the judgment is res judicata does not raise a constitutional issue, and therefore, this court will not consider the same.

If the appellee is erroneous in this statement, then the appellee submits that the facts do not support the contention of the appellant Thompson that said judgment is res judicata. The judgment in the prior action does not state that the contract existing between the appellee and the appellant Thompson cannot be further modified. The question involved in said prior action was whether the pension provisions of the City of Long Beach could be modified by a subsequent charter amendment, and whether the electorate, by adopting Section 187.1 of the charter, intended to modify the pension rights of plaintiffs named therein. The District Court of Appeal held that the pension rights of the plaintiffs named therein were subject to modification and that the electorate, by the adoption of Section 187.1, intended to modify said rights. The judgment of the court defined the contractual rights of the parties as they existed under statutes at the time the judgment was rendered. The case at issue involves the effect of Section 187.2, which section was adopted six years later, upon the pension rights of the appellant Thompson. Thus, the prior case and the case at issue involve different statutes, enacted at different times.

The law is well established in California that the rule of res judicata extends only to facts and conditions as they existed at the time the judgment was rendered and to the legal rights and relations as fixed by the facts determined by that judgment, and that when other facts or conditions intervene before the second suit, furnishing a

new basis for claims and defenses, the issues are no longer the same and the former judgment cannot be pleaded as a bar to the second action.

Lord v. *Garland*, 27 Cal. 2d 840;
Title Guarantee & Trust Company v. *Monson*, 11 Cal. 2d 621;
Lillis v. *Emigrant Ditch Co.*, 95 Cal. 553;
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Purcell v. *Victor Power, etc., Co.*, 29 Cal. App. 504;
Bank of America, etc., Assn. v. *McLaughlin*, 22 Cal. App. 2d 411;
Hurd v. *Albert*, 214 Cal. 15;
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Freman v. *Marshall*, 137 Cal. 159;
Natural Soda Products Company v. *City of Los Angeles*, 109 Cal. App. 2d 440;
Horton v. *Goodenough*, 184 Cal. 451

Appellee submits that the questions presented in this appeal have long been so definitely determined that no substantial questions are presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgments of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, be affirmed.

IRVING M. SMITH,
City Attorney,
CLIFFORD E. HAYES,
Deputy City Attorney,
Counsel for Appellee.

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OPPOSITION BRIEF

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No. 384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CECELIA S. LARSON and RUSSELL T. THOMPSON,
Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,
Appellee.

ON APPEALS FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Of counsel:
COVINGTON & BURLING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 384

CECELIA S. LARSON and RUSSELL T. THOMPSON,
Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,
Appellee.

ON APPEALS FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellee's motion, though briefed under three captions, is grounded essentially on the contention that the federal question raised by these appeals is insubstantial. Much of appellee's argument is already answered by the Statement as to Jurisdiction. We believe, however, that a summary discussion of the

constitutional issue will be of assistance to the Court, and will reveal not only that the federal constitutional question is substantial, but also that the decisions below, which denied the federal right which appellants claim, are erroneous and should be reversed.

I

The Essential Facts

The basic facts are not in dispute and can be simply stated. In 1925 the city of Long Beach, appellee herein, enacted Section 187 of its charter; that section established a pension system for police and fire department employees (Cal. Statutes, 1925, p. 1333, Jur. Statement, App. H). The amount of the pension payable after retirement upon completion of the specified years of service was a specified percentage of the annual salary paid to employees holding the rank held by the retired employee one year prior to retirement. A similar pension, in like amount, was also provided for the widow of an employee killed in line of duty. Under this system, the amount of the pension varied as the salary level changed, in order to keep the pension payments adjusted to the current value of the dollar. See *Klench* v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171, 249 Pac. 46, 51-53 (1926). For example, in time of inflation when the purchasing power of the dollar is low, and salaries are correspondingly high, the pension payments are adjusted accordingly. See *Casserly* v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237, 239 (1936).

Engebret Larson, the husband of appellant Larson, and appellant Thompson were members of the Long Beach police and fire departments, respectively. After some 18 years of service, Mr. Larson was killed in line

of duty in 1942 (Complaint, Par. II, Jur. Statement, App. E).[1] Appellant Thompson, after 22 years of service, retired in May 1951 (Complaint, Par. II, Jur. Statement, App. F). Appellant Larson was duly paid, from 1942 through June 1951, a monthly pension equal to 50 percent of the salary paid during that time to a Sergeant in the Police Department, the rank held by Mr. Larson a year before his death (Complaint, Par. III). Appellant Thompson, on his retirement on May 1, 1951, was duly paid through June 1951 a monthly pension equal to 50 percent of the salary paid to a Captain in the Fire Department, the rank held by him one year prior to his retirement (Complaint, Pars. V, VI).

Section 187 of the charter was amended in June 1951 by the addition of Section 187.2 (Cal. Statutes, 1951, p. 4635, Jur. Statement, App. G). This amendment purports to freeze, or fix, "[t]he amount to be paid as a pension to each person granted a pension prior to the effective date of this amendment, pursuant to rights thereto vested by reason of the provisions of Section 187 of this Charter * * * at the amount paid to each such person by the City on the effective date of this amendment and thereafter said pension shall be paid monthly in said fixed amount." Shortly thereafter salaries were raised in both the Police and Fire Departments, with the result that both appellants have received since June 1951 less than the amounts provided for by Section 187 itself (Complaints, Larson, Par. III; Thompson, Par. VI). These suits are for the difference.

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[1] Under state practice, although the trial court made no findings, the effect of its judgments in appellants' favor was to find in favor of appellants on all material issues in the pleadings. *Mastrofini* v. *Swanson*, 114 Cal. App. (2d) 848, 250 P. (2d) 764 (1952).

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II

The Question Involved Is Substantial

There is no dispute on the question that appellants have been substantially disadvantaged by the 1951 amendment. Stated in terms of the constitutional issue, there is no doubt that, if they had contract rights to the pensions provided by the plan as of the date their respective pensions began, those rights have been impaired. The sole issue, and the one urged by appellee in support of its motion, is that no such contract rights existed.

In deciding that issue the Court does not, of course, disregard the decisions of the state courts; indeed, the Court will "lean towards an agreement of views with the State courts if the question seems * * * balanced with doubt." *Burgess* v. *Seligman*, 107 U.S. 20, 34; see also *Phelps* v. *Board of Education*, 300 U.S. 319, 322. Nevertheless, this Court has made it plain that it recognizes an obligation to make an independent determination; otherwise it could not properly enforce the guaranty of the Federal Constitution against impairment by state legislative action. *Indiana* ex rel. *Anderson* v. *Brand*, 303 U.S. 95, 100. Particularly is this true when the contract sought to be enforced is embodied in a statute or ordinance and the party against whom it is sought to be enforced is the state or one of its political subdivisions. *Douglas* v. *Kentucky*, 168 U.S. 488, 500-502; *Stearns* v. *Minnesota*, 179 U.S. 223, 232-233.

Where, as here, there is no dispute that the enactment upon which appellants base their claim contains no reservation of a right to reduce pensions once granted, and when the issue is therefore whether such a reservation is to be implied, there is also, of necessity,

a further limitation on the extent to which the views of a state court are significant. A state court decision authoritatively construing a state enactment *before* the time when rights under it are alleged to have ripened into a contract stands on a different footing than a state court decision which construes a state enactment *after* that time. In the one case, the decision may be said to have added a gloss to the enactment itself, and parties who thereafter bring to final fruition their rights under the enactment may be taken to have contracted in the light of both the enactment and the decision. In the latter case, the state court is doing no more than determining whether a given set of facts which have already happened has created, or failed to create, the contract right alleged. It has no better basis for judgment than this Court on that issue. The difference is noted in *Burgess* v. *Seligman, supra,* at pp. 33-34:

> "So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

See also *McCracken* v. *Hayward,* 2 How. 608, 612.

In the instant case, there is one more qualification which should be noted. Because of the small amount of money in issue, the decision of the court below is not subject to review by California's highest court. Indeed, as will appear in the discussion below, one of the issues is as to the meaning of the opinions of the Supreme Court of California. Again, the court below

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is in no better position to make that interpretation than is this Court.

Is there, then, in the light of these principles, a substantial question presented by the cases of these two appellants?

In the case of appellant Larson, the contract upon which she bases her present claim was created, if it was created at all, in 1942, when the death of her husband became the final event necessary to fulfill the conditions of the pension plan, and to entitle his widow to the payments as therein specified.

Appellee urges, however, that it was not created—or at least that it was subject to the implied condition that the amounts to be paid under the contract could thereafter be substantially reduced. Its contention is based upon certain California decisions, which are discussed below. What is important to note, however, is that appellee's brief in support of its motion cites *no California case whatever* on this issue decided *before* appellant Larson's rights matured in 1942. The reason is not far to seek; the "gloss", if any can be said to exist as of that date, is directly contrary to appellee's assertion of an implied right to modify contracts once they have matured. The California decisions prior to 1942 are uniform, and unambiguous, that under a pension plan such as that here involved the happening of the last event required under the pension plan creates a contractual right which is beyond the power of the legislative authorities to impair. As early as 1901, in *Kavanagh* v. *Board of Police Pension Fund Commissioners*, 134 Cal. 50, 66 Pac. 36, the Supreme Court of California upheld a widow's claim to a death benefit payment provided for under a statute in effect when her husband died in 1897 and rejected a defense based

on a statute of 1900 which repealed the former statute, stating (66 Pac. at p. 37):

> "Respondent's right, therefore, became vested while the statute under which she claims was in full force, and it was not competent for the legislature, or any other authority, to deprive her of that vested right."[2]

Between 1901 and 1942, although the question was apparently never again squarely raised, the California courts on numerous occasions reiterated that principle. See, *e.g.*, *Klench* v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171, 249 Pac. 46, 50 (1926); *Sunder* v. *Collins*, 219 Cal. 430, 27 P. (2d) 382, 383 (1933); *Vero* v. *Sacramento City Employees' Retirement System*, 41 Cal. App. (2d) 482, 107 P. (2d) 82, 84 (1940).

In 1942, therefore, when the rights of appellant Larson were finally established, both Section 187 and the California decisions established a right securely rooted in a contract and beyond the power of appellee to modify.

Appellee does not, and cannot, challenge these facts. Its sole reliance is bottomed on a claim that later—in 1947—the Supreme Court of California reversed its prior opinion and decided that an implied reservation of a right to reduce pensions had always existed. *Kern* v. *City of Long Beach*, 29 Cal. (2d) 848, 179 P. (2d) 799. Whether such a judicial reversal, had it in fact occurred, could be effective to deprive appellant Larson of rights which she already had would in itself present

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[2] The California Supreme Court later noted that the pension plan involved in the Kavanagh case was of the same nature as that created by Section 187. *Kern* v. *City of Long Beach*, 29 Cal. (2d) 848, 179 P. (2d) 799, 801 (1947), quoted infra, p. 8.

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a substantial federal question. See *Ohio Life Insurance & Trust Co.* v. *Debolt,* 16 How. 416, 431-432. It is, however, one which need not be reached in this case, for the decision upon which appellee relies did not *decide* the question at all, and the opinion, when read as a whole, does not support appellee's claim.

At issue in the *Kern* case was the constitutionality of a 1945 amendment to Section 187 which, in effect, abolished the pension plan in its entirety (Section 187.1, Cal. Statutes, 1945, p. 2954, Jur. Statement, App. I). Kern, the plaintiff in the action, had not retired at the time that the 1945 amendment became effective, nor was he then eligible to retire. The issue, in other words, was whether, as applied to non-retired employees who were still continuing to work, the city had the power to repeal its pension system. The court held that it did not.

The opinion in the *Kern* case is in no sense ambiguous in thus defining the precise nature of the question before the Court. It begins by noting that in some states pensions for government employees are held to be bounties which can be withdrawn at any time, but that in California such had not been the rule (179 P. (2d) 800-801). It then proceeds with an express quotation from, and reaffirmation of, the *Kavanagh* case (see p. 6, *supra*) stating (*id.* at p. 801):

> "It is settled in this state that pension rights acquired by public employees under statutes similar to the Long Beach charter become vested as to each employee at least upon the happening of the contingency upon which the pension becomes payable."

Having made that point clear, the court continues (*ibid*):

> "It is contended by the city, however, that petitioner did not acquire any vested right to a pension because he did not complete the prescribed period of service prior to the time the pension provisions were repealed. It is therefore necessary to ascertain whether any rights vested prior to the repeal and, if so, the nature and extent of those vested rights."

During the discussion of *that* issue—which is, of course, not the issue presented here—the court made two statements by way of dictum upon which appellee here relies. The first, made in the course of a discussion of the doctrine that pension rights of not-yet retired employees are subject to reasonable modification (although not to outright repeal) is as follows (*id.* at pp. 802-803):

> "It has also been held that a pension could be reduced prior to retirement from the two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence."

Appellee, in construing the statement as support for its position, reads the phrase "modifications have been approved" in this statement as meaning "reductions have been approved" or "impairments have been improved". Not only does the statement not so state, but to construe it as appellee does would make it flatly inconsistent with other statements in the opinion. Moreover, and perhaps even more importantly, the cases which are cited for the statement show that appellee has misunderstood its meaning. None of the seven cases to which the court makes reference hold that the obligation of a pension plan contract can be reduced or

impaired "after the happening of the contingencies upon which the payments were to be made." At least two of the seven cases contain statements in the opinions which are precisely to the contrary. See *Brooks* v. *Pension Board*, 30 Cal. App. (2d) 118, 85 P. (2d) 956, 958 (1938); *Vero* v. *Sacramento City Employees' Retirement System*, 41 Cal. App. (2d) 482, 107 P. (2d) 82, 84 (1940). As a statement of what other cases have held, in other words, which is all the statement purports to be, the opinion cannot be read as appellee reads it without making it simply erroneous.[3]

The second dictum to which appellee refers is a statement made in support of the court's conclusion that under Section 187 there were some rights which "vested" before, as well as after, the final contingency occurred which entitles the employee to a pension. The Court said (*id.* at p. 803):

> "Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due."

---

[3] There can be, of course, no constitutional objection to a "modification" of a contract which increases, rather than decreases, the state's obligation—*i.e.*, which does not impair its obligation. Moreover, it is possible that the *amount* of a pension might be reduced without impairing the obligation of the pension contract. In *Casserly* v. *City of Oakland*, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936), which was one of the seven cases cited in support of the court's statement, a pension plan substantially identical with that here involved was in issue. The claim was made that a widow's pension could not be reduced even when the corresponding salaries to which it was related were cut. The contention was rejected. No impairment of the contract was involved, as is the case here, since the reduction was in strict accord with the provisions of the contract. See 56 P. (2d) at p. 239.

As a statement of rationale for the decision invalidating the total abolition of Section 187, the statement cannot be challenged. As an authority in support of appellee's position, however, it is clearly inapposite. Not only is it discussing only the "time of vesting", but in the same paragraph the court continues:

> "* * * the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened * * *."

The court below states (Jur. Statement, App. A) that it came to its conclusion after a reading of the opinion not only in the *Kern* case but also in three later cases—*Packer* v. *Board of Retirement*, 35 Cal. (2d) 212, 217 P. (2d) 660 (1950); *Palaske* v. *City of Long Beach*, 93 Cal. App. (2d) 120, 208 P. (2d) 764 (1949); and *Allen* v. *City of Long Beach*, 101 Cal. App. (2d) 15, 224 P. (2d) 792 (1950), appeal dismissed, 342 U.S. 804. In each of the three later cases, however, the issue was similar to that involved in the *Kern* case, *viz*: the rights of the employees who had not retired and were not eligible to retire at the time of the challenged modifications of the pension plan. They could not decide, and did not purport to decide, the issue presented here.

We submit, therefore, that in view of the unqualified approval which the California Supreme Court gave to the *Kavanagh* case in the *Kern* opinion as quoted above, and in view of the fact that appellee relies upon dicta which are at best ambiguous and are inconsistent

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with far less ambiguous statements elsewhere in the opinion—and, if read as appellee seeks to read them, are to some extent demonstrably erroneous—it cannot be said that the decision or opinion in the *Kern* case has taken away, in 1947, the rights which appellant Larson unquestionably had in 1942. At the very least, whether it has done so is a question of substance; we submit that in fact it has not done so, or purported to do so, and that the decision by the court below sanctions a substantial impairment of appellant Larson's rights, and should be reversed. It is also significant that on June 4, 1953, following the decision of the court below, a judge in another department of the Superior Court of Los Angeles has held the reduction authorized by Section 187.2 unconstitutional as to another retired pensioner. *English* v. *City of Long Beach* (unreported, No. LB C-17578).[4]

The case of appellant Thompson differs from that of petitioner Larson in two respects. First, since he did not retire until 1951, it may be said that the decision in the *Kern* case in 1947 was, as to him, a gloss on the pension plan which modified his contractual rights during the period before the happening of the final contingency which perfected his contract right. For the reasons already stated in discussing the *Kern* case above, we believe that it cannot be said to have had any such effect. Isolated statements unnecessary to the decision, which if read to support appellee's contention are partly erroneous and are at best wholly ambiguous, coupled with unambiguous statements reaffirming a frequently-stated, 50-year old, rule, cannot reasonably be said to supply a basis on which Thompson should

[4] Nine copies of the careful, reasoned, memorandum opinion of Judge Nourse in this case have been lodged with the Clerk.

have known that after 1947 his pension rights were no longer what they had been—an undertaking by the city to pay upon retirement, after 20 years of service, in accord with the terms of Section 187, but were rather something wholly different—an undertaking by the city merely to pay *something,* but not necessarily as much as it appeared to offer by the terms of its charter.

Moreover, neither appellee nor appellant Thompson could in fact have so believed that appellant Thompson's rights were affected by the *Kern* case. *Before* he retired, but *after* the *Kern* decision, he was one of numerous plaintiffs in *Allen* v. *City of Long Beach, supra.* The issue in that case was of course different from the issue here; none of the plaintiffs had yet retired, and their claim was bottomed on the argument that even *before* retirement they were entitled, under the *Kern* case, to object to certain modifications (not here involved) which had been made in the pension plan as being unreasonable. Although that claim was denied, the court entered a judgment (Jur. Statement, App. F, Exh. A) which in direct language stated the rights of the plaintiffs, including petitioner Thompson:

> "IT IS ORDERED, ADJUDGED AND DECREED that the repeal of Section 187 of the Long Beach City Charter by the terms of Section 187.1 thereof has no binding force or effect upon the respective rights of any of the plaintiffs above named to earn and receive the various pension benefits provided by Section 187 of said City Charter and that their respective rights to earn and receive the various benefits provided by Subdivisions (2), (3) and (4) of said Section 187 are and were contractual in nature and hence within the protection of the provisions of Article I, Sections 13 and 16 of the Constitution of the State of California and of Section 10 of Article I of the Constitution of the

> United States as well as the Fourteenth Amendment to said Constitution, which prohibit the taking of property without due process and the impairment of contractual obligations, provided, however, that said contractual rights are limited, with respect to a retirement pension, to an annual pension equal to one-half of the salary attached to the rank held by such plaintiff or plaintiffs one year prior to the date of their respective retirements, and no more."

Appellee concedes in its brief (p. 19) that:

> "The judgment of the court defined the contractual rights of the parties as they existed under statutes at the time the judgment was rendered."

Any modification of the statute which might conceivably have been created by the *Kern* opinion was thus effectively eliminated.

It might be added that the City of Long Beach, which was appellee there as well as here, in successfully urging in this Court that the question of the validity of the changes in Section 187 as applied to *non*-retired employees was not substantial, quoted with approval in its Statement Opposing Jurisdiction, many California cases which state the rule for which we now contend, *e.g.* the "pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension" (*Carr* v. *Fire Commission*, 30 Cal. App. (2d) 208, 211, 85 P. (2d) 959, 960 (1938)). Statement Opposing Jurisdiction, No. 155, October Term, 1951, p. 12. See also, *id.*, pp. 9, 10, 11, 12, 13. Appellee's Statement

Opposing Jurisdiction in *Allen* v. *City of Long Beach, supra,* states the California rule as follows (p. 7):

> "However, it is well established, under the minority [California] rule, that no vested rights are infringed upon by a modification or amendment of the pension statute *if such modification takes effect before the happening of the contingency which entitles the employee to receive a pension.*" (Italics supplied.)

We believe that to be a correct statement. The *Kern* case had then been decided and was cited and quoted in appellee's brief (pp. 3, 13-14). In the light of that statement, and of the judgment which judicially defined appellant Thompson's rights, it simply cannot now be argued persuasively that Section 187 had been given, as to him, the drastic judicial modification for which appellee contends—that it was no longer a firm contract, but one which could be unilaterally amended.

It remains only to note the several decisions cited by appellee which arose in jurisdictions other than California. They are, for that very reason, of no application here. Many states, it is true, have adopted the rule that a pension is a mere bounty which may be given, withheld or modified, at the discretion of the public authorities. In such states no contract right can arise. In California, however, pension statutes are not subject to any such statutory or judicial gloss; they are regarded as creating not mere bounties, but contracts, upon the happening of the final contingency. And such contracts are, like any others, protected against impairment by the Federal Constitution. *Lynch* v. *United States,* 292 U.S. 571; *Indiana* ex rel. *Anderson* v. *Brand,* 303 U.S. 95.

CONCLUSION

We submit, therefore, that appellee's motion should be denied.

Respectfully submitted,

KENNETH SPERRY,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
Counsel for Appellants

COVINGTON & BURLING,
Of Counsel.

October 3, 1953

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No. 384

Supreme Court of the United States

OCTOBER TERM, 1953

CECELIA S. LARSON AND RUSSELL T. THOMPSON,
Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,
Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PETITION OF APPELLANTS FOR REHEARING.

KENNETH SPERRY,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
ADRIAN S. FISHER,
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Of Counsel:
COVINGTON & BURLING

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Supreme Court of the United States

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ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PETITION OF APPELLANTS FOR REHEARING.

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

Cecelia S. Larson and Russell T. Thompson, appellants herein, respectfully pray that a petition for rehearing be granted in the above entitled cause after its order dismissing said appeal "for want of a substantial federal question", made and entered herein on November 30, 1953, and in support thereof show the following:

1) That subsequent to the submission of appellee's motion to affirm or dismiss herein, the highest court of the state from which said appeal was taken, to wit, the California Supreme Court, by its decision made and

entered in connection with the case of *Terry* v. *City of Berkeley*, filed November 25, 1953, published December 1, 1953, 41 A.C. 715, —— P. 2d ——, has so clarified the law of California as to make it clearly apparent that the decisions of the Appellate Department of the Superior Court from which the instant appeals were taken, as well as the contentions urged by appellee in support of its motion to dismiss, are based upon an erroneous interpretation of the California law which gives rise to the federal questions herein presented, and that a reversal of said decisions is necessary in order to prevent a serious miscarriage of justice. This decision did not come to the attention of counsel until too late to call it to the attention of this Court prior to its order granting appellee's motion to dismiss in this case on November 30, 1953. A copy is attached as Appendix A.

2) The issue presented in the case at bar is whether the appellee, the City of Long Beach, could constitutionally modify to appellants' detriment, the provisions of a statute which provided for the payment of specified retirement, disability and death benefits after the happening of the contingencies which made such benefits payable. More specifically, the question presented is whether the pensions which appellants were receiving as the widow of a deceased policeman and as a retired fireman, respectively, could be "frozen" at a fixed sum by an amendment to the city charter, when the statute in force at the time the appellant Larson's husband was killed and the appellant Thompson retired for length of service, provided for the payment of a fluctuating pension, i.e., 50% of whatever amount is currently being paid to one holding the rank or position formerly held by the policeman or fireman at the

time of death or retirement. It was conceded by appellee that acceptance of employment and the performance of services by the employee in reliance upon the offer embodied in the statute created a contract between the city and its employees. However, the court below, relying upon certain ambiguous language as used by the California Supreme Court in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799 (1947), determined that the obligation on the part of the city was merely to pay a reasonable and substantial pension which was subject to reasonable modification after, as well as before, the happening of the contingency which matured the pension, viz.:

> "* * * we have no hesitation in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension." (Jurisdictional Statement, p. 47.)

In the *Kern* case, and the others alluded to in the opinion, the California courts were concerned solely with the constitutionality of an attempted repeal or modification of a pension system as it applied to the rights of employees who were not then eligible for retirement. An examination of the decision in the *Terry* case will reveal that the constitutional problems therein presented were identical to those presented in the case at bar. There, as here, the court was called upon to determine the constitutionality of an amendment to an

existing pension system which attempted to alter the monthly benefits payable to a municipal employee after the happening of the contingency (there a service-connected injury) which matured his pension. There, as here, the statute in force at the time of his retirement as construed by the court entitled the retired employee to receive monthly payments throughout the remainder of his life measured by the salary currently attached to the position formerly held by the employee for a certain period of time preceding his retirement. There, as here, the statute under consideration purported to modify this formula and to provide for the payment of a fixed pension, namely, 50% of the average salary received by the employee for a period of three years preceding his retirement. There, as here, the defendant city contended that the contract right of the employee was merely to receive a reasonable and substantial pension which was subject to modification after, as well as before retirement, relying upon the same ambiguous language which was quoted by appellee in its motion to dismiss or affirm herein from the former decision of the California Supreme Court in the cases of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799 (1947), and *Packer* v. *Board of Retirement*, 35 Cal. 2d 212, 217 P. 2d 660 (1950). In disposing of this contention, the California Supreme Court in the *Terry* case at p. 719 of its opinion said:

> "In support of the asserted retroactive effect of Section 24.1 the defendants contend that although the right to a pension is a vested right as an integral part of the contract of employment still it is a right to a fair pension only the terms of which may be altered within reason without an impairment of the contract. They rely in the main upon

Kern v. City of Long Beach, 29 Cal. 2d 848. But in that case and in the other cases referred to (Packer v. Board of Retirement, 35 Cal. 2d 212; Sweesy v. L. A. Etc. Retirement Board, 17 Cal. 2d 356; Brophy v. Employees Retirement System, 71 Cal. App. 2d 455; McCarthy v. Oakland, 60 Cal. App. 2d 547; Brooks v. The Pension Board, 30 Cal. App. 2d 119) the court did not have before it the question of the obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. *The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency.* (In this connection see, Home v. Souden, 199 Cal. 508, concerning changes beneficial to the pensioner made after the happening of the contingency.) *In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment.* (Robertson v. Miller, 276 U. S. 174; Kern v. City of Long Beach, supra, 29 Cal. 2d 848; Kavanagh v. Board of Police P. F. Commrs., 134 Cal. 50; Vero v. Sacramento City E. R. System, 41 Cal. App. 2d 482; 20 Cal. Jur. 998.)" (Emphasis ours.)

Accordingly the court affirmed a judgment of the Superior Court whereir the plaintiff employee was permitted to recover the difference between the amounts previously paid him as a pension pursuant to the amended statute, and the fluctuating benefits provided for by the statute in force at the time of the happening of the contingency which matured his pension.

3) The foregoing language is precisely applicable in the present case since both appellants had, like Terry, "been retired", "rendered the called for performance", "had done everything possible to entitle" them "to the payment of" their "pension", and "all conditions precedent to the obligation of the city were fulfilled". It is crystal clear, therefore, that the court below has in fact misconstrued the opinions of the Supreme Court of California. In the *Terry* case the amount due the pensioner at the time suit was filed exceeded $3,000.00; hence, it was possible to file suit in the Superior Court from which an appeal could be perfected to the California Supreme Court, whereas the amounts due at the time suits were filed in the cases at bar were such that appellants were compelled to sue in the municipal court of the Long Beach Judicial District, from which exclusive jurisdiction on appeal was vested in the Appellate Department of the Superior Court. As pointed out in the jurisdictional statement at pages 16 and 17, no procedure is available under state practice to review the decisions of that court by any higher court in the state, and appellants were compelled to seek relief in the Supreme Court of the United States to protect their contractual rights to receive the pension payments in question as against impairment by the state statute which the municipal court held was unconstitutional, but which the Appellate Department of the Superior Court held was valid.

4) In the case at bar we therefore have the situation wherein this Court has been prevailed upon to dismiss an appeal from the decision of an intermediate court of California, which is clearly in conflict with the highest court of the same state upon a substantial Federal question, namely, whether the contract right of a municipal employee to receive specific monthly benefits measured by the salary currently attached to the rank formerly held by him, may be altered to his detriment after the happening of the contingency which entitled him to receive the lifetime pension. While it must be confessed that the relative importance of the question thus presented from the standpoint of the public at large is somewhat lessened by the fact that the California Supreme Court has now clarified the law of that state on the question here presented, the apparent injustice of the decisions appealed from is correspondingly increased insofar as the respective rights of the instant appellants are concerned. In other words, if the decisions of the Appellate Department of the Superior Court are permitted to stand, which follows automatically from the granting of appellee's motion to dismiss (Cyc. of Fed. Proc., 3rd ed., Vol. 14, p. 614), said decisions, even if erroneous, will establish the law of the case insofar as these appellants are concerned (*Union Oil Co. of California* v. *Reconstruction Oil Co.*, 20 Cal. App. 2d 170 66 P. 2d 1215 (1937); 58 Cal. App. 2d. 30, 135 P. 2d 621 (1943); *Panos* v. *Great Western Packing Co.*, 21 Cal. 2d 636, 134 P. 2d 242 (1943)), and by virtue of the principles of res adjudicata, their contract rights as construed by the highest court of the state, will be impaired with respect to all payments which have or will become due them following June 5, 1951, and throughout the remainder of their lives, contrary to the purpose and effect of Article I, Section 10,

and the due-process clause of the Fourteenth Amendment to the Federal Constitution.

5) Analytically, a determination of whether a particular state action impairs the obligation of contract involves a determination of whether a) a contract, in fact, existed and b) the action complained of impairs its obligation. The question of whether a contract exists is a question of state law and although a state court determination does not bind this Court it will be accepted unless manifestly wrong. See *Dodge* v. *Board of Education*, 302 U.S. 74; *Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95; *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168. This Court stated its view in the case of *Dodge* v. *Board of Education* in the following the language (302 U.S. at 79):

> "While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters."

In the statement filed by the City of Long Beach opposing jurisdiction and moving to dismiss or affirm, Counsel for the City of Long Beach relied heavily upon the argument that under the law of the State of California the appellants did not have the contractual rights which were claimed, and therefore no impairment of the obligation of contract existed. See Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, pp. 7-15.

The decision of the Supreme Court of California in *Terry* v. *City of Berkeley* held, as to an identical pension system, a contract right did exist under California law identical with that claimed by the appellant in this

proceeding. This decision is an intervening event of great importance to this Court.

It establishes that the appellants do have the contract rights which they claim. With these contract rights established the validity of the provisions of the charter of the City of Long Beach which impair them is clearly a substantial Federal question, even though it would not have been if the existence of these contract rights had not been established.

The procedure normally followed by this Court is described in *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U.S. 154, 160-63. This customary procedure is for this Court to vacate the judgment of the state court where there has been a supervening event since its rendition by the State Court which alters the basis upon which the judgment rests and to remand the case to the state court so that the court might reconsider the question in light of the changed circumstances. See *Huddleston* v. *Dwyer*, 322 U.S. 232; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445.

It is submitted that the interests of justice require similar action in this case.

WHEREFORE, appellants respectfully pray:

A. That this court grant a petition for rehearing and note probable jurisdiction.

B. In the alternative, and to prevent a clear miscarriage of justice, that it revoke its former order, take jurisdiction of the case, and reverse or set aside the decisions of the Appellate Department of the Superior Court herein appealed from, and remand the cause to that court with instructions to take such further proceedings as may be appropriate in the light of the decision in *Terry* v. *City of Berkeley*. (Title 28, U.S.

Code Sec. 2106.) In this way the Court, without itself becoming involved in the controversy, can prevent the judgment below from becoming final and can afford the opportunity to the court below to take whatever corrective action it believes appropriate in the light of the subsequent decision of the California Supreme Court.

C. For such other or different relief as may be appropriate.

Respectfully submitted,

KENNETH SPERRY,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
ADRIAN S. FISHER,
Counsel for Appellants

Of Counsel:

COVINGTON & BURLING

December 15, 1953.

We certify that this petition is presented in good faith and not for delay.

AMY RUTH MAHIN
ADRIAN S. FISHER

December, 1953

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

S. F. 18585

ERNEST TERRY, *Plaintiff and Respondent,*

vs.

CITY OF BERKELEY, ET AL., *Defendants and Appellants.*

This is an appeal from a judgment for the plaintiff in an action by a retired police officer for declaratory relief and for an accumulated amount alleged to be due him from a pension fund pursuant to an ordinance of the defendant city of Berkeley.

The plaintiff was a member of the Police Department of the city of Berkeley from August, 1925, to May 1, 1940, when he was retired because of physical disability incurred in the line of duty. At the time of his retirement and for more than three years immediately prior thereto he held the rank of "Mounted Patrolman" and received the salary attached to that rank of $185.00 per month. At that time Berkeley Ordinance No. 2250-N.S. provided that under the conditions applicable to the plaintiff's retirement a pension would be paid during the period of his disability. Section 13 of the ordinance fixed the amount of the pension in the following language: ". . . he shall be paid from the Fund during the period of his disability a pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retiremnt . . . ." Accordingly, the plaintiff's pension was determined to be $92.50 a month at the time of his retirement, and payments of that amount were made to him. Shortly after his retirement the salary attached to the rank of mounted patrolman was increased and additional periodic increases later became effective. Finally, in February, 1951, subsequent to the commencement of this action, the salary was increased to $334.80 per month. The amounts received by the plaintiff have remained at $92.50 a month. He asserts that he is and has been entitled to one-half of the fluctuating salary attached to the rank he held rather than to one-half the monthly amount paid to him during the three years immediately prior to his retirement. The trial court

agreed with the interpretation of Section 13 asserted by the plaintiff and awarded to him the sum of $3,095.74, the difference between $92.50 and one-half of the salary attached to the rank of mounted patrolman for the years within the period of the statute of limitations and the elapsed time since the filing of the complaint. In addition the court awarded in his favor the declaratory relief sought by the plaintiff as to future payments.

The question involves the construction of Section 13 prior to its amendment as hereinafter indicated. More precisely the question is the proper application of the term "salary" as used in that section. The plaintiff contends that at any particular time it is the salary then attached to the rank held for the three years immediately prior to retirement. The defendants contend that it is a fixed amount, the equivalent of the salary actually earned during the three year period.

The plaintiff's basic contention is that the three year period defines only the rank held and not the salary earned. It finds support in the language of the ordinance itself which refers to the "average salary" as that "attached to the rank or ranks held during the three years." The plaintiff argues that had the framers of the ordinance intended that the pension be fixed by the average salary earned during the three year period they would have so indicated by describing the "average salary" as that which "was attached to the rank or ranks held during the three years", rather than by using the phrase "the average salary attached" which indicates a presently existing salary. He contends that the framers were aware of such a distinction as evidenced by the language they employed in Section 10 to establish a pension ascertainable by reference to a fixed salary independent of salary fluctuations within ranks. That section provides: "Upon the death of any person receiving a pension . . . a pension equal to one-third of the average salary upon which said pension . . . was based" shall be awarded to certain survivors.

The plaintiff relies upon Casserly v. City of Oakland, (1936) 6 Cal. 2d 64, wherein a provision of the charter of the City of Oakland provided that a pension should be "equal to one half of the salary attached to the rank held" at the date of retirement. The court held that this provision provided for a fluctuating pension, which increased or decreased as the salaries paid to active employees increased or

decreased. The language employed in the present case differs from that in the Casserly case only in the addition and substitution of the underlined words in the following quotation of the charter provision in the latter case: "equal to one-half of the *average* salary attached to the rank *or ranks* held *during the three years immediately preceding the date of* retirement." The plaintiff contends that the additional language merely changes the method of determining the "rank" on which pension payments are to be based. While the particular rank in the Casserly case was determined by reference to the rank held at retirement, in the present case it is determined by reference to the rank or ranks held for three years prior to retirement. As the salary of the rank in the Casserly case fluctuated the pensioner's benefits were also held to fluctuate. As the average salary of the rank or ranks held in the present case fluctuates, the plaintiff argues that his benefits should also fluctuate unless the Casserly case is to be disregarded. The court there held at page 66: "the salary attached to the rank at the time the payments fall due, and not the salary at the time the pension was awarded, measures its amount."

In Klench v. Board of Pension Fund Commrs., (1926) 79 Cal. App. 171, a statute provided that a retired police officer was entitled "during his lifetime to a yearly pension equal to one-half of the amount of salary attached to the rank he may have held on such police force on the date of such retirement." The following language from that case is quoted in the Casserly case at pages 66-67: ". . . it is our belief that the word 'salary' . . . was intended to refer to the rank of the retired police officer and not to the time at which he was retired. In other words, the section as phrased seems clearly enough to indicate that what the legislature intended thereby to declare was that, on being retired under said act, a member of the police department should be paid a pension based upon the salary which may be paid to police officers of the *rank held by him at the time of the retirement* of such officer." (To the same effect, see Whitehead v. Davie, 189 Cal. 715; Jones v. Cooney, 82 Cal. App. 265; Aitken v. Roche, 48 Cal. App. 753, 755; Rumetsch v. Davie, 47 Cal. App. 512, 514.)

The defendants contend that the Casserly and other similar cases are not applicable to the facts of the present case because of the difference in the language employed.

But they fail to point out a material variation pertinent to the issue here under consideration. True, the provisions of the ordinance might be susceptible to more than one interpretation. But ambiguity and uncertainty in this type of legislation requires, under accepted rules, a construction which will, if reasonably possible, accomplish the objects and purposes of the legislation. "It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant." (Gibson v. City of San Diego, 25 Cal. 2d 930, 935; See also Lyons v. Hoover, 41 A.C. 147; McKeag v. Board of Pension Commrs., 21 Cal. 2d 386, 390.)

To accomplish the result sought by the defendants required an amendment to Section 13. This was brought about in 1944, more than four years after the plaintiff retired. The pertinent portions of the section as amended provide for "a pension equal to one-half of the average monthly rate of salary which such member shall have received during the three years immediately preceding the date of retirement . . . ." Also in 1944 Section 24.1 was added to the ordinance in an endeavor to make Section 13 as amended retroactive. The new section provided that "any person now receiving a pension under the terms of this ordinance shall receive an amount based upon the average monthly rate of salary which such member received during the three years immediately preceding the date of retirement, and that said amount shall be a fixed amount that shall not increase nor decrease, regardless of any change in salary subsequent to the date of the granting of the original pension . . . ."

In support of the asserted retroactive effect of Section 24.1 the defendants contend that although the right to a pension is a vested right as an integral part of the contract of employment still it is a right to a fair pension only the terms of which may be altered within reason without an impairment of the contract. They rely in the main upon Kern v. City of Long Beach, 29 Cal. 2d 848. But in that case and in the other cases referred to (Packer v. Board of Retirement, 35 Cal. 2d 212; Sweesy v. L.A. Etc. Retirement Board, 17 Cal. 2d 356; Brophy v. Employees Retirement System, 71 Cal. App. 2d 455; McCarthy v. Oakland, 60 Cal. App. 2d 547; Brooks v. The Pension Board, 30 Cal. App. 2d 119) the court did not have before it the question of the

obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency. (In this connection see, Home v. Souden, 199 Cal. 508, concerning changes beneficial to the pensioner made after the happening of the contingency.) In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment. (Robertson v. Miller, 276 U.S. 174; Kern v. City of Long Beach, supra, 29 Cal. 2d 848; Kavanagh v. Board of Police P.F. Commrs., 134 Cal. 50; Vero v. Sacramento City E.R. System, 41 Cal. App. 2d 482; 20 Cal. Jur. 998.)

Accordingly it is concluded that the provisions of Section 13 in effect when the Plaintiff retired were in all material respects the same as the language of the charter provisions of the City of Oakland involved in the Casserly case, insofar as those provisions relate to the present inquiry; and that the amended section did not affect the plaintiff's retirement benefits.

The judgment is affirmed.

SHENK, J.

We concur:

CARTER, J.
TRAYNOR, J.
SCHAUER, J.
SPENCE, J.

We concur in the judgment:

GIBSON, C. J.
EDMONDS, J.

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1953

No. 384

CECILIA S. LARSON and RUSSELL T. THOMPSON,

Appellants,

vs.

CITY OF LONG BEACH, a municipal corporation,

Appellee.

APPELLEE'S ANSWER TO PETITION OF APPELLANTS FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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Appellee.

APPELLEE'S ANSWER TO PETITION OF APPELLANTS FOR REHEARING.

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

The appellants are requesting that this Honorable Court set aside its order granting appellee's motion to affirm or dismiss on the following grounds:

> "1) That subsequent to the submission of appellee's motion to affirm or dismiss herein, the highest court of the state from which said appeal was taken, to wit, the California Supreme Court, . . . has so clarified the law of California as to make it clearly apparent that the decisions of the Appellate Department of the Superior Court . . . are based upon an erroneous interpretation of California law which gives rise to the federal questions herein presented, . . ."

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"2) . . . whether the appellee, the City of Long Beach, could constitutionally modify to appellants' detriment, the provisions of a statute which provided for the payment of specified retirement, disability and death benefits after the happening of the contingencies which made such benefits payable."

In answer to the first question, the appellee submits that the appellants did not take said appeals from the Supreme Court of California, but from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. The appellee submits that the decisions of the Appellate Department of the Superior Court are not in conflict with the decision of the Supreme Court of the State of California in the case of *Terry v. City of Berkeley,* 41 A. C. 715, a copy of which decision is attached to petition of appellants for rehearing.

The Supreme Court of the State of California, in the *Terry* case, stated that the City could not modify the pension rights of the plaintiff therein *to the detriment of the plaintiff.* In the above cited case, the evidence established that the salary fixed for the rank of "Mounted Patrolman" was and had been for more than three years prior to 1940 the sum of $185.00 per month, and that by February of 1951, the salary had been increased to $334.80 per month. The Supreme Court stated that the pension payments *"may not be changed to his detriment by subsequent amendment."* (Italics ours.) Thus, the City of Berkeley attempted to fix the pension of the plaintiff at a time when salaries had remained stable for a number of

years. When economic cycles are taken into consideration, it would be unreasonable to assume that salaries would drop below the 1937 to 1940 level, and if salaries did not drop below the 1937 to 1940 level, the plaintiffs therein would suffer a detriment. It was on this basis, therefore, that the Supreme Court of California determined that the amendment adopted by the City of Berkeley was void. *However, it is to be noted that the Supreme Court of California did not declare all amendments to pension statutes after retirement void.* Such a declaration would prevent a governmental body from increasing pension benefits in event pensions were low and did not meet the requirements of elderly pensioners. It was only those which were detrimental to the pensioner which were declared void. Furthermore, at the time of the preparation of this answer, the judgment in the *Terry* case had not become final. The appellee has been informed that a petition for rehearing was filed, but has not been informed as to the disposition thereof.

One of the questions involved in these appeals, is whether the amendment to the Charter of the City of Long Beach is in fact detrimental to the appellants. If the amendment is not in fact detrimental, then the law of California is clear that the amendment is not unconstitutional. The facts in the case at issue are clearly distinguishable from the facts in the case of *Terry v. City of Berkeley, supra.* As appellee has heretofore pointed out, the City of Berkeley attempted to fix pensions based on the salaries paid between 1937 and 1940, and that by

February of 1951, the salary fixed for the rank of "Mounted Patrolmen" had increased from $185.00 to $334.80. In the case at issue, the appellee did not attempt to fix pensions based on the 1937 to 1940 salary schedules but on the 1951 salary schedules. This court can take judicial notice of the fact that wages and salaries have increased substantially within the eleven years preceding June of 1951. As a matter of fact, the City of Long Beach, like all employers of labor, was required to make substantial raises in salaries. The amendment to the Charter of the City of Long Beach froze pension payments at a relative high level. It is true that salary raises have been granted since June of 1951. The appellee submits that this court cannot determine as a matter of fact that salaries will not drop below the 1951 level. If salaries drop below the 1951 level, the appellants will have received a benefit, and therefore, it cannot be said that the amendment will operate to the detriment of the appellants. In fact the Appellate Department of the Superior Court of the State of California recognized this fact when it stated:

> ". . . and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension."

The appellee submits that in order to hold the charter amendment involved unconstitutional, the court must reach the conclusion that salaries will not drop below the 1951 level. If salaries drop below the 1951 level, then the

appellants will receive a higher pension in the future but receive less at the present time.

The history of this country has been one of rises and falls in its economy. Wages and prices have not remained steady for any appreciable period of time. During recent years prices and wages have risen, but there can be no certainty that wages and prices will not again recede, and whether they will remain above or drop below the 1951 level is a matter of pure speculation. If the wages drop below the 1951 level, then the appellants will receive benefits rather than have suffered a detriment. Only the passage of time can answer this question. Therefore, unless a governmental body is precluded from making any amendments to its pension statutes, it cannot be said that the 1951 amendment to the Charter of the City of Long Beach is unconstitutional for the reason that it amends the pension statutes to the detriment of the pensioners. In fact, the Supreme Court of the State of California, in the *Terry* case, cited the case of *Home v. Souden,* 199 Cal. 508, in support of the proposition that beneficial amendments may be made to pension statutes.

On page 6 of their petition, the appellants argue that it is crystal clear that the decision of the Appellate Department of the Superior Court misconstrued the opinion of the Supreme Court of California in the *Kern* case. It is true that some of the language in the decision of the Appellate Department of the Superior Court is inconsistent with the language of the Supreme Court of California in the *Terry* case. However, the Appellate

Department of the Superior Court in its decision recognized the fact that *the amendment may have the effect of returning less today and more tomorrow, and therefore, implies that the amendment is not necessarily detrimental to the pensioner.*

On page 7 of their petition, appellants argue that this court has been prevailed upon to dismiss the appeals from a decision of an intermediate court of California which is clearly in conflict with the decision of the highest court of said state. The appellee submits that it has established that the decisions filed in these appeals are not in conflict with the decision of the Supreme Court of California in the *Terry* case. If the amendment is not in fact detrimental to the interest of appellants, then appellants will not be prejudiced by this court denying the petition for rehearing.

On page 8 of their petition, the appellants contended that "Counsel for the City of Long Beach relied heavily upon the argument that under the law of the State of California the appellants did not have the contractual rights which were claimed, and therefore no impairment of the obligation of contract existed." The appellee at all times conceded that the appellants had vested contractual rights of which they could not be deprived. However, the appellee contended that the rights could be modified. The Supreme Court of the State of California has apparently recognized that pension statutes may be modified so long as the amendment is beneficial and not detrimental to the rights of the pensioners. *The appellee*

submits that it has not been established that the questioned amendment is in fact detrimental to the appellants, and therefore, no federal question has been presented to this court.

The appellants are requesting this court to remand the actions to the state court so that said court might reconsider the question in light of the changed circumstances. The only question for the state court to consider, unless the decision of the Supreme Court of the State of California in the case of *Terry v. City of Berkeley, supra,* is set aside, is whether the amendment is in fact detrimental. The appellee submits that this question has already been considered by the state court when it stated that the amendment may pay less today but more tomorrow. To decide otherwise would be to speculate as to future economic trends.

WHEREFORE, appellee respectfully prays that the petition of appellants for rehearing be denied.

IRVING M. SMITH,
City Attorney,

CLIFFORD E. HAYES,
Deputy City Attorney,
Counsel for Appellee.

NOVEMBER 30, 1953.

Per Curiam Decisions.

No. 384. LARSON ET AL. *v.* CITY OF LONG BEACH. Appeal from the Superior Court for the County of Los Angeles, California, Appellate Department. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *John Charles Spence, Jr., Charles A. Horsky* and *Amy Ruth Mahin* for appellants. *Irving M. Smith* for appellee.